after the words "confirm the layout of the booths." and before the words "complies with the submitted diagram".

Section 18. Section 6.54.040(B)(3) is amended by deleting that subsection in its entirety and substituting in lieu therefore:

> The police department shall complete its investigation and the codes department, and health department shall complete their respective inspections and shall communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:
>
> > *The location at* _____ *complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.*
> >
> > *The location at* _____ *does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.*
>
> The writing from the police department shall end with substantially the following statement:
>
> > *The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes:*
> >
> > *Name* *Crime* *Date*

Section 19. Section 6.54.040(B)(4) of the MCL is amended by deleting the subsection in its entirety and renumbering accordingly.

Sectoin 20. Section 6.54.040(C) of the MCL is amended by deleting paragraph 1 in its entirety and substituting the following and renumbering the remaining subsections accordingly.

> 1. Within fifteen days of receiving the results of the investigation conducted by the police department and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this code section and the applicable health statutes, ordinances and regulations.
>
> 2. If the board determines that the applicant is in compliance with the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.
>
> 3. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

Section 21. Section 6.54.040(C)(3) is amended by deleting paragraph 3 in its entirety and substituting the following and renumbering this subsection as number "5".

> 5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a license for one year from the date the citation was sustained. A violence of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant until the judgement is reversed.

Section 22. Section 6.54.040(C)(4) is amended by adding the following sentence to the end of the paragraph, "False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application."

Section 23. Section 6.54.040(C)(7) of the MCL is amended by renumbering this subsection as subsection "9" and by deleting the words "fire department" after the words "inspection reports from the codes department" and before the words "and health department," and by deleting the words "the applicable statutes, ordinance, and regulations" and substituting in lieu therefore the words "this code section or the applicable health statutes, health and zoning ordinances and health and zoning regulations" after the words "if the board shall determine that the applicant is not in compliance with" and before the words

"the applicant shall be notified in writing, the next business day".

Section 24. Section 6.54.040(C)(9) of the MCL is amended by adding the words "False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application." at the end of that subsection and by renumbering this subsection as "11".

Section 25. Section 6.54.040(C)(10) of the MCL is amended by deleting the word "any" and substituting in lieu therefore the word "a" after the words "or his or her refusal or failure to appear at" and before the words "reasonable time and place for examination under oath regarding such application".

Section 26. Section 6.54.040(D)(1), 6.54.040(D)(1)(a) and 6.54.040(D)(1)(e) of the MCL are amended by deleting the reference to "6.54.040(C)(5)" and substituting in lieu therefore "6.54.040(C)(4)". Further 6.54.040(D)(1)(a) is amended by deleting the word "five" in the first line and substituting in lieu therefore the word "fifteen".

Section 27. Section 6.54.040(D)(1)(d) of the MCL is amended by deleting the reference to "6.54.040(C)(4)" and substituting in lieu therefore "6.54.040(C)(6)".

Section 28. Section 6.54.040(D)(2)(d) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

> d. An extension shall only be granted when the Codes inspector and the Health inspector the agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated

a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

Section 29. Section 6.54.040(E)(1)(c) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

e. At the hearing, the applicant may present evidence as to why his/her license should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 30. Section 6.54.040(E)(1)(d) of the MCL is amended by deleting the word "stating" and substituting in lieu therefore the word "state" after the words "the application at the hearing and in writing" and before the words "the reasoning for the boards decision." Further Section 6.54.040(E)(1)(d) of the MCL is amended by deleting the word "reasoning" and substituting in lieu therefore the word "reasons" after the words "at the hearing and in writing state the" and before the words "for the board's decision."

Section 31. Section 6.54.050(A)(1) of the MCL is amended by deleting the words "room or cubicle" after the words "having available for customers, patrons or members any booth" and before the words "for the private viewing of any sexually oriented entertainment" and by deleting the word "private" after the words "patrons or members any booth, room or cubicle for the" and before the words "viewing of any sexually oriented entertainment" and by deleting the words "or sexually oriented live exhibitions" after the words "sexually oriented films,

sexually oriented movies, sexually oriented videos" and before the words "shall submit a diagram under Section 6.54.040(A)(6)".

Section 32. Section 6.54.050(A)(1)(a) of the MCL is amended by deleting the words "room or cubicle" after the words "Access. Each booth," and before the words "shall be totally accessible to and from aisles".

Section 33. Section 6.54.050(A)(1)(b) of the MCL is amended by deleting the words "room or cubicle" after the words "Construction. Every booth" and before the words "shall meet the following"

Section 34. Section 6.54.050(A)(1)(b)(i) of the MCL is amended by deleting the words "room or cubicle" after the words "Each booth," and before the words "shall be separated from" and by deleting the words "rooms and cubicles" after the words "shall be separated from adjacent booths," and before the words "and any nonpublic areas by a solid or opaque wall;"

Section 35. Section 6.54.050(A)(1)(b)(v) of the MCL is amended by deleting the words "room or cubicle" after the words "The lighting level of each booth" and before the words "shall be a minimum of ten footcandles".

Section 36. Section 6.54.050(A)(1)(c) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

> c. Occupants. Only one individual shall occupy a booth, at any time. No occupant of a booth shall engage in any type copulation, masturbation or the display of specified anatomical areas as defined herein, cause any bodily discharge of urine,

> feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

Section 37. Section 6.54.050(A)(2) of the MCL is amended by deleting the words "or sexually oriented live exhibitions" at the end of that subsection.

Section 38. Section 6.54.050(B)(1)(b) of the MCL is amended by deleting the reference to subsection "6.54.040(A)(5)(j)" and substituting in lieu therefore "6.54.040(A)(5)(i)".

Section 39. 6.54.050(B)(1)(c) of the MCL is amended by deleting the words "have the ability in control or be" and substituting in lieu therefore the word "are" after the words "all persons having a financial interest in the business and who" and before the words "involved in the day-to-day operation of the business".

Section 40. 6.54.050(B)(2) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "convicted of a crime of a sexual nature, as defined in 6.54.010," and before the words "in any jurisdiction shall be eligible to receive a license.

Section 41. 6.54.050(B)(2)(c) of the MCL is amended by deleting this subsection in ist entirety and substituting the following in lieu therefore:

> The time is computed from the date of the conviction by the trial court to the date of the application. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

Section 42. 6.54.050(B)(3) of the MCL is amended by adding the words "False or misleading information does

not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.." at the end of that subsection.

Section 43. 6.54.050(B)(3)(a) of the MCL is amended by deleting the words "or any crime involving moral turpitude" at the end of that subsection paragraph.

Section 44. 6.54.050(B)(3)(b) and 6.54.050(B)(3)(d) of the MCL is amended by deleting who word "longer" and substituting in lieu therefore the word "later" The amendment is to the last word in both subsections.

Section 45. 6.54.050(B)(3)(e) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "crime of a sexual nature, as defined in 6.54.010." and before the words "then the applicant shall not be eligible to receive a license" and by deleting the word "longer" at the end of this subsection and substituting in lieu therefore the word "later".

Section 46. 6.54.050(B)(3)(c) of the MCL is amended by adding the words "Chapter 17.36.260 of" after the words "If the misleading statements or omissions referred to violation of" and before the words "the zoning code" and by deleting the word "longer" at the end of this subsection and substituting in lieu therefore the word "later".

Section 47. 6.54.050(B)(4) of the MCL is amended by adding a new subsection 4 and renumbering the subsequent subsections accordingly. New subsection "4" shall read,

> 4. The applicant shall not have had a sexually oriented business permit/license or similar business permit/license revoked within the last year immediately preceding the application.

Section 48. Renumbered Section 6.54.050(B)(5) of the MCL is amended by deleting that subsection in its entirety and substituting in lieu therefore:

> 5. No applicant shall have been found to have previously violated Chapter 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect an the disqualification of the applicant until the trial court's judgement is reversed.

Section 49. 6.54.050(B)(5) of the MCL is amended by renumbering this subsection as "6" and by deleting the words "cubicles or stalls" after the words "if the applicant plans to have or has booths," and before the words "for the purpose of viewing sexually oriented motion pictures," and by deleting the words "or-sexually oriented live entertainment" after the words "sexually oriented movies, sexually oriented films, sexually oriented videos" and before the words "then the booths," and by deleting the words "cubicles or stalls" after the words "then the booths" and before the words "must comply with the requirements set out in 6.54.050(A)."

Section 50. 6.54.060(B) of the MCL is amended by deleting each date of "April 15, 1998" and substituting in lieu therefore the date "March 15, 1999"

Section 51. Section 6.54.070(A)(2) of the MCL is amended by deleting it in its entirety and the following substituted in lieu therefore:

> Application forms shall be available at the office of the board. Applicants may obtain their implication from the codes department. Applicants must also submit with each application two 2X2 photos.
>
> a. Background check. All background checks shall be completed by the metropolitan police department. The police department my be notified of a need for a background check in two ways. The applicant brings her application, including a one of the two photos to the police department and has her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.
>
> b. Fingerprints. The applicant may have his/her fingerprints completed by the police department or other qualified person.
>
> c. Fees. If the applicant brings her application to the police department, the police department shall not charge the applicant any

additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department than it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give then to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the $100.00 permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints taken by a qualified person other than the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

Section 52. Section 6.54.070(A)(4)(b) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore: "Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;"

Section 53. Section 6.54.070(A)(4)(c) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection.

Section 54. Section 6.54.070(A)(4)(d) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection.

Section 55. Section 6.54.070(A)(4)(c) of the MCL is amended by deleting the word "operated" and substituting

in lieu therefore the word "entertained" after the words "Whether the applicant previously" and before the words "in this or any other county, city or state under a sexually oriented business license/permit" and by adding the words "within the last two years" after the words "under a sexually oriented business license/permit or similar business license/permit" and before the words "For whom the applicant was employed or associated at the time." And by deleting the word "ever" after the words "Whether the applicant has" and before the words "had such a license/permit revoked as suspended," and by adding the words "within the last two years and" after the words "had such a license/permit revoked or suspended," and before the words "the reason therefor and the business entity or trade name".

Section 56. Section 6.54.070(A)(4)(f) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore:

> All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that has occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that has occurred within the past five years.

Section 57. Section 6.54.070(A)(4)(g) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection and before the semicolon and the word "and".

Section 58. Section 6.54.070(B) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore:

Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2X2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history. Subject to 6.54.150.

Section 59. Section 6.54.070(C)(1) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore and renumbering the following paragraphs sequentially.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in 6.54.010, has not had a similar type of permit/license revoked in the last two years is at least eighteen years of age, and has not given may false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not mean any information which the applicant had reason to believe was correct.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

Section 60. Section 6.54.070(C)(4) of the MCL is amended by adding the words "False or misleading information does not mean any information which the applicant had reason to believe was correct," at the end of the paragraph.

Section 61. Section 6.54.070(C)(5) of the MCL is amended by adding the words "the revocation of" after the words "b) verification of out-of-state employment relating to a sexually oriented business or" and before the words "a sexually oriented business license/permit or similar business"

Section 62. Section 6.54.070(C)(7) of the MCL is amended by deleting the word "any" after the words "or his/her refusal or failure to appear at" and before the words "reasonable time and place for examination under oath".

Section 63. Section 6.54.070(D)(3) of the MCL is amended by adding the letter "B" between "6.54.150" and the number "10".

Section 64. Section 6.54.070(D)(4) of the MCL is amended by deleting the letter "A" at the end of the paragraph and substituting in lieu therefore the letter "B".

Section 65. Section 6.54.080(A)(2) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "No applicant convicted

of a crime of a sexual nature, as defined in 6.54.010," and before the words "in any jurisdiction shall be eligible to receive"

Section 66. Section 6.54.080(A)(2)(b) of the MCL is amended by deleting the words "or plea" after the words "If the conviction" and before the words "was for a felony violation"

Section 67. Section 6.54.080(A)(3) of the MCL is amended by adding the words "False or misleading information does not mean any information which the applicant had reason to believe was correct" at the end of the paragraph.

Section 68. Section 6.54.080(A)(3)(a) of the MCL is amended by deleting the words "or any crime involving moral turpitude" at the end of the paragraph.

Section 69. Section 6.54.080(A)(3)(c) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "If the misleading statements or omissions referred to a crime of a sexual nature, as defined in 6.54.010" and before the words "then the applicant shall not be eligible to receive a permit"

Section 70. Section 6.54.080 is amended by adding a subsection "4" which shall read as follows:

> 4. The applicant shall not have had a sexually oriented business permit/license or similar business permit revoked within the last year immediately preceding the application.

Section 67. Section 6.54.090(C) is amended by deleting the words "turned into the board" and substituting in

lieu therefore the words "returned to the board and cease to be valid." at the end of that subsection.

Section 71. Section 6.54.100 of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

Section 72. Section 6.54.110(F) of the MCL is amended by adding the following to the end of the paragraph:

> The renewal must also include an updated background check by the police department and an updated 2X2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

Section 73. Section 6.54.110(K) of the MCL is amended by deleting this subsection in its entirety and substituting the following in lieu therefore:

K. The application for a renewal is subject to the same rules and limitations as the initial application.

Section 74. Section 6.54.120(B) of the MCL is amended by deleting the word "fire" and substituting in lieu therefore the words "board inspector" after the words "the following departments: police, codes," and before the words "and health" at the end of the paragraph.

Section 75. Section 6.54.130(A) of the MCL is amended by deleting the word "or" after the words "operator's license shall be revoked, suspended" and before the word "renewed" and by adding the words "or penalty assessed" after the word "renewed" and before the words "subject to the limit described in Section 6.54.150(C)" and by deleting the word "limit" and substituting in lieu therefore the word "limits" after the words "subject to the" and before the words "described in Section 6.54 150(C)" at the end of that subsection and by deleting the code section "6 54 130(C)" and substituting in lieu therefore "6.54.120(E)"

Section 76. Section 6.54.130(B) of the MCL is amended by deleting the subsection in its entirety and re-lettering the subsections accordingly.

Section 77. Section 6.54.130(C) of the MCL is amended by adding the words "on the premises of a licensed business," at the end of the paragraph.

Section 78. Section 6.54.130(D) of the MCL is amended by deleting the words "cubicles, rooms or stalls" after the words "the entire interior portion of the booths" and before the words "wherein sexually oriented entertainment is provided, shall be visible" and by deleting the words "cubicles, rooms or stalls" after the words "Further, any wall forming any portion of the booths," and before the words "shall be solid and without any openings, extended from the floor to a height of not less than six feet."

Section 79. Section 6.54.130(E) of the MCL is amended by combining 6.54.130(E) and 6.54.130(F) and renumbering the remaining sections accordingly.

> E. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

Section 80. Section 6.54.130(G) of the MCL is amended by amending the wording for the required signage by deleting the words "entertainer or" appearing after the words "which provides that" and before the words "Customer shall be permitted.

Section 81. Section 6.54.130(H) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time any patron is permitted access to any booth.

Section 82. Section 6.54.130(I) of the MCL is amended by deleting the words "stalls or cubicles" after the words "to ensure that the illumination in booths" and

before the words "described in Section 6.54.050(A)(1)(b)(iv) is maintained at all times" and by deleting the code section "6.54.050(A)(1)(b)(iv)" and substituting in lieu therefore "6.54.050(A)(1)(b)(v)".

Section 83. Section 6.54.130(J) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> No operator, shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

Section 84. Section 6.54.130(K) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operators to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered.

Section. 85. Section 6.54.140(A) of the MCL is amended by adding the words "on the premises for furthering the business, not including independent contractors on the premises for repairs or construction," after the words "No operator, entertainer or employee" and before the words "of a sexually oriented business shall permit to be performed,".

Section 86. Section 6.54.140(B) of the MCL is amended by adding the words "on the premises for furthering the business, not including independent contractors on the premises for repairs or construction," after the words "No operator, entertainer or employee" and before the words "shall encourage or permit any person upon the premises to touch".

Section 87. Section 6.54.140(C) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

Section 88. Section 6.54.150 of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore.

6.54.150 Revocation or suspension of license/permit.

> A. The board shall revoke a license for any of the following reasons:
>
> > 1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not mean any information which the applicant reasonably believed was correct;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence, should have known that licensee was employing, an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known that he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or

sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have know that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a 24 month period, not including any period of suspension. The fact that a the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous violations of TCA § 57-4-204 or Metropolitan Code § 7.24.030.

Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating TCA § 57-4-204 or Metropolitan Code § 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove on a defense to the alleged

violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54. T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the license shall either be fined $500 or his/her licensee shall be suspended for a period no less than five (5) days and no longer than thirty (30) days or the licensee shall be both fined $500 and his or her license suspended for a period of not less than five (5) days and no longer than thirty (30) days.

3. Upon the second violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the license shall be suspended no less than thirty-one (31) days and no longer than ninety (90) days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a 24 month period not including any period of suspension. The fact that a the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated T.C.A. Section 57-4-204 or

Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not mean any information which the applicant reasonably believed was correct;

2. The permittee has become ineligible to obtain a permit under 6.54.080(A);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access

to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four (24) months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan

Code Section 7.24.030 within a twenty-four (24) month period, not including periods of suspensions, the permittee shall either be fined $500 or his or her permittee shall be suspended for a period no less than five (5) days and no longer than thirty (30) days or the permittee shall be both fined $500 and his or her permit suspended for a period of no less than five (5) days and no longer than thirty (30) days.

Upon the second violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one (31) days and no longer than ninety (90) days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under 6.54.150(A)(7), (8) and 6.54.150(C)(7), (8) of this section.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. This has no effect, whatsoever, on the licensee's/permittee's right to appeal any revocation to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permitee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

Section 89. Section 6.54.160(2) of the MCL is amended by deleting the reference to § 6.54.150(B)" and substituting in lieu therefore "6.54.150(B) or (D)".

Section 90. Section 6.54.160(3) of the MCL is amended by deleting the reference to "6.54.150(A)" and substituting in lieu therefore "6.54.150(A) or (C)"

Section 91. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO FORM AND LEGALITY:

/s/ Shayna Abrams
Metropolitan Attorney

INTRODUCED BY:

/s/ Chris Ferrell

Members of Council

Amendment No. 1
to
Substitute Ordinance 99-1503

Mr. President,

I move to amend Substitute Ordinance 99-1503 as follows:

Section 1. Amend Section 2 of SO99-1503 amending section 6.54.010 of the Metropolitan Code of Nashville and

Davidson County ("MCL") by deleting Section 2 in its entirety and substituting the following therefore:

> Section 2. Section 6.54.010(C) "Crimes of a sexual nature" of the MCL is amended by adding the words "public indecency" after the words "means the crimes of rape, aggravated rape, aggravated sexual assault," and before the words "statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure,". Further 6.54.010(H) is amended by deleting the reference to "39-15-511" and substituting in lieu therefore the reference "39-13-511". Further 6.54.010(S) is amended by adding a new subsection "S" and renumbering the remaining subsections. The new subsection "S" shall read:
>
> > S. "Public Indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.
>
> Further 6.54.010(W) of the MCL is amended by deleting the definition of "Sexually oriented" in its entirety and substituting the following in lieu therefore:
>
> > W. "Sexually oriented" means any exhibition of any motion pictures, films, or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Section 2. Amend Section 12 of SO99-1503 amending Section 6.54.040(A)(5)(e) of the MCL by deleting Section 12 in its entirety and substituting the following therefore:

> Section 12. Section 6.54.040(A)(5)(e) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore:
>
> f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years.

Section 3. Amend Section 23 of SO99-1503 amending section 6.54.040(C)(7) of the MCL by deleting Section 23 in its entirety and substituting the following therefore:

> Section 23. The first sentence of 6.54.040(C)(7) shall be amended by renumbering the subsection as subsection "9" and by deleting the first sentence in its entirety and substituting the following in lieu therefore:
>
> 9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this code section, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and regulations.

Section 4. Amend Section 57 of SO99-1503 amending section 6.54.070(A)(4)(g) of the MCL by adding the following language to Section 57: "Further Section 6.54.070(A)(4)(g) is amended by deleting the word 'portrait' after the words 'Fingerprints and two' and before the words 'photographs at least two inches by two inches' in the first sentence."

Section 5. Amend Section 59 of SO99-1503 by deleting Section 59 in its entirety and substituting the following:

> Section 59. Section 6.54.070(C)(1) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore and renumbering the following paragraphs sequentially.
>
> 1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in 6.54.010, has not had a similar type of permit/license revoked in the last two years is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.
>
> 2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant

> by United States Mail to the address listed on the application.

Section 6. Amend Section 61 of SO99-1503 amending 6.54.070(C)(5) of the MCL by adding the following to the end of section 61:

> Further 6.54.070(C)(5) is amended by deleting the last sentence of that paragraph and substituting in lieu thereof the following sentence:
>
> > False or misleading information does not include information which the applicant reasonable believed, after exercising due diligence, was correct at the time of the application.

Section 7. Section 63 of SO99-1503 amending 6.54.070(D) of the MCL is amended by adding this sentence at the end of section 63:

> Section 6.54.070(D)(1)(c) of the MCL is amended by deleting the last sentence of the paragraph and substituting in lieu thereof the following sentence:
>
> > Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 8. Section 68 of SO99-1503 amending 6.54.080(A)(3)(a) is amended by adding the following sentences at the end of Section 68:

> Section 6.54.080(A)(3)(a) of the MCL is further amended by deleting the last sentence of the paragraph and substituting in lieu thereof the following sentence:

> False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

Section 68 of SO99-1503 is further amended by adding the following sentence:

> Section 6.54.080(A)(3)(b) and (c) of the MCL is amended by deleting the word "longer" at the end of the both paragraphs and substituting in lieu therefore the word "later".

Section 9. Section 73 of SO99-1503 amending Section 6.54.110 is amended by adding the following as the first sentence of Section 73:

> Section 6.54.110(L)(3) of the MCL is amended by deleting the last sentence of the paragraph in its entirety and substituting in lieu thereof the following sentence:
>
> > Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 10. Section 78 of SO99-1503 amending Section 6.54.130(D) is amended by adding the following as the first sentence of Section 78:

> Section 6.54.130(D) of the MCL is amended by deleting the first sentence of the paragraph in its entirety and substituting in lieu thereof the following sentence:
>
> > Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths,

> wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same.

Section 11. Section 88 of SO99-1503 is amended by deleting the amended language of Section 6.54.150(A)(1) in its entirety and substituting the following Section 6.54.150(A)(1):

> (A)(1). Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

Section 12. Section 88 of SO99-1503 is further amended by deleting the amended language of Section 6.54.150(C)(1) in its entirety and substituting in lieu thereof the following Section 6.54.150(C)(1):

> (C)(1). Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application

Section 13. Section 88 of SO99-1503 is further amended by deleting the last sentence of the amended

language in Section 6.54.150(E)(3) and substituting the following in lieu thereof:

> Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

Section 14. SO99-1503 is further amended by adding a new Section numbered "92" which shall read as follows:

> Section 92. Section 6.54.020(F) of the MCL is amended by adding the word "civil" after the words "which inspectors shall not hold any" and before the words "service status."

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: February 16, 1999

ORDINANCE NO. O99-1814

An ordinance to amend Title 6, Chapter 8.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Now therefore, be it enacted by the Metropolitan Council of Nashville and Davidson County as follows.

Section 1. Sections 6 54 010 is amended by adding a definition for the term "Booth" which shall be incorporated into the definitions in accordance with the definitions alphabetical organization and re-lettering any subsequent definitions accordingly

"Booth" means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common area or the premises and is used for presenting sexually oriented entertainment including, but not limited to viewing sexually oriented moving pictures or viewing sexually oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons

Section 2. Section 6.54 010(O) of the MCL is amended by deleting the definition of "Operator" in its entirety and substituting the following in lieu therefore.

"Operator" means any person, partnership, limited partnership, joint venture, corporation or any other type of

business entity operating, conducting or maintaining a sexually oriented business

Section 3. Section 6 54.010(X) of the MCL is amended by amending the definition of "Sexually oriented" by inserting a (1) after the word "means" and before the words "any exhibition" and by inserting a (2) after the word "or" and before the words "any live performance"

Section 4. Section 6.54.010(Y) of the MCL is amended by amending the definition of "Sexually oriented business establishment" by deleting the last sentence.

Section 5. Section 6.54.010(Y)(3) of the MCL is amended by amending the definition of "Sexually oriented theatre" by deleting the word "building" after the word "enclosed" and before the word "regularly" and inserting in lieu thereof the words "area, not including a booth".

Section 6 Section 6 54 020(C) of the MCL is amended by adding the following sentence at the end of the paragraph. "The vice-chair is authorized to act in the place of the chair and in the same capacity as the chair when the chair is unavailable"

Section 7. Section 6 54 020 (D)(2) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore the following "A quorum shall mean that two members of the board are present at the meeting A quorum is required for the purpose of transacting business"

Section 8 Section 6 54 030(B) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore the following

B Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity which desires to operate more than one sexually oriented business/establishment must have a license for each sexually oriented business/establishment

Section 9 Section 6 54 040(A)(1) of the MCL is amended by deleting the first sentence in its entirety and substituting in lieu therefore "Any person, partnership, joint venture corporation or any other type of business entity desiring to secure a license shall make application to the board."

Section 10. Section 6.54.040(A)(4) is amended by deleting this subsection in its entirety and substituting the following in lieu therefore

The following persons must be listed in the license application for any sexually oriented business that is a corporate entity of any kind the registered agent and the name and address of all officers and directors of the corporation and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation and management of the business The following person must be listed in the license application for any sexually oriented business that is a partnership, limited partnership, joint verdure, or any other type of business the name and address of all persons who will be involved in the day-to-day operation and management of the business.

Section 11 Section 6 54 040(A)(5)(c) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore

Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business/adult entertainment license/permit Whether the applicant has ever had such a license/permit revoked or suspended within the last year from the date of application the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation

Section 12 Section 6 54 040(A)(5)(f) is amended by deleting the subsection in its entirety and enacting a new subsection (f) as follows

All Judgements by a court within one year for violations of the metropolitan zoning Section 167 64 260

Section 13. Section 6 54.040(A)(5)(k) of the MCL is amended by deleting the subsection in its entirety and substituting the following in lieu therefore

k A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate

Section 14. Section 6 54 040(A)(6) is amended by deleting the subsection and adding a new subsection as follows

The applicant shall provide the board with his/her application, a diagram, drawn to scale of the premises, including the location and layout of all booths and stages and the location of the clerk/manager's stand or counter Though the diagram shall be drawn to scale, it does not have to be professionally prepared

Section 15 Section 6.54.040(A) is amended by adding a new subsection as follows

If any of the information on the application changes over the course of the time the license is issued, including any changes in the physical layout of the premises, the licensee shall inform the board, in writing, of the changee

Section 16. Section 6 54 040(B)(1) is amended by adding the words and figures "6.54 050 (A)(3) and 6.54 130(C)" after-the numbers "6 54 050(A)(1) and before the words "of this chapter" in the first sentence Section 6 54.040(B)(1) of the MCL is further amended by deleting the last sentence of that paragraph and substituting in lieu therefore the following:

Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no violations of applicable statutes ordinances, or regulations, no violations of the provisions of this chapter, no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history

Section 17 Section 6.54.040(B)(2) of the MCL is amended by deleting the subsection in its entirety and enacting a new subsection as follows.

The code department shall confirm that any booths or stages conform with the submitted diagram and the requirements set out in Sections 6.54.050(A) and 6 54 130

Section 18 Section 6.54 040(C)(1) is amended by deleting the word "code section" before the words "and the applicable health statutes" and after the words "applicant is in

compliance with this" and substituting in lieu therefore the word "chapter".

Section 19 Section 6 54 040(C)(2) is amended by adding the words "this chapter" after the words "If the board determines that the applicant is in compliance with" and before the words "the applicable health statutes, ordinances and regulations,"

Section 20 Section 6 54 040(C)(3) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore

3. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of the events described in this paragraph.

Section 21 Section 6.54.040(C)(4) of the MCL is amended by deleting the words and figures "Section 6 54 050(B)(2)" before the words "such denial" and substituting the words "the provision of this chapter

Section 22. Section 6.54 040(C)(5) of the MCL is amended by deleting the word "until the judgement is reversed" in the last sentence of the section and substituting the words "unless the judgement is stayed"

Section 23 Section 6 54.040(C)(7) of the MCL is amended by deleting the words "a diagram is required under subsection (A)(6) of this section and based or the code inspection" at the beginning of the first sentence and is further amended by adding the word and numbers "or 6 54 130 before the words "or the submitted diagram"

Section 24 Section 6.54.040(C)(9) of the MCL is amended by deleting the words "code section" and substituting in lieu therefore the word "chapter" after the words "if the board shall determine that the applicant is not in compliance with this" and before the words "the zoning code or the applicable health statutes, ordinances and regulations"

Section 25. Section 6.54.040(C)(11) of the MCL is amended by deleting the last sentence of the section

Section 26 Section 6 54 040(D)(1) of the MCL is amended by deleting the words "under subsection (C)(5) or (C)(7) of this section" after the word "denied" and before the words "the applicant may reinstate"

Section 27 Section 6 54 040(D)(1)(a) of the MCL is amended by deleting the words "described in subsection (C)(5) or (C)(7) of this section" after the word "denial" and before the words "to cure the violation"

Section 28. Section 6.54.040(D)(1)(e) of the MCL is amended by deleting the following words at the end of the subsection, "in accordance with subsection (C)(5) or (C)(7) of this section" and by deleting the word "is" and substituting in lieu therefore the words "will be" after the words "code violations have not been corrected, then the application" and before the word "denied" at the end of that subsection.

Section 29 Section 6 54 040(D)(2) of the MCL is amended by deleting the following words at the end of the subsection, "in accordance with subsections (C)(5) (C)(7) or (D)(3) of this section"

Section 30. Section 6.54.040(D)(2)(a) of the MCL is amended by deleting the word "five" and substituting the

word "fifteen" and by deleting the following words at the end of the subsection, "described in subsection (C)(5) or (C)(7) of this section

Section 31 The last sentence of Section 6 54.040(D)(3) of the MCL is amended by adding the word "initial" after the words "an extension of time have passed, the" and before the word "denial" and by deleting the words "described in subsections (C)(5) and (C)(7) of this section" after the word "denial" and before the words "shall be treated as a denial of the application"

Section 32. Section 6.54.040(E)(1) is amended by adding a new subsection

f If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of that specified time period

Section 33. Section 6.54.050(A)(1)(c) of the MCL is amended by deleting the section

Section 34. Section 6.54.050(A) is amended by adding a new subsection as follows:

3. Any live performance of sexually oriented entertainment shall occur upon a stage at least 18 inches above the immediate floor level and removed at least 3 feet from the nearest customer A three foot boundary from the outer edge of the stage shall be indicated on the floor by a rail barrier, lighting, luminous tape or paint, or any other method which will make the boundary visible in a darkened condition so that the customer will not invade the 3

foot boundary from the stage with any portion of his/her body

Section 35. Section 6 54 050(B) of the MCL is amended by deleting paragraph 6 in its entirety and substituting the following,

6 Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed

Section 36 The last sentence of Section 6 54 050(B) is amended by deleting the word "permitted" and substituting in lieu therefore the word "described" after the words "until a permit is granted except as" and before the words "in Section 6.54.070(D)(4)"

Section 37 Section 6 54 060 is amended by adding a new subsection as follows

C Any entertainer found to have violated this chapter by providing sexually oriented entertainment in a sexually oriented business/establishment in the metropolitan area without a permit as evidenced by a judgement of a court within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on

the disqualification of the applicant unless the judgement is stayed

Section 38 Section 6.54 070(A)(2)(a) of the MCL is amended by adding the word "his" before the words "her application, including one of the two photos to the police department" after the words "The police department may be notified of a need for a background check in two ways The applicant brings" and further adding the word "his" before the words "her fingerprints taken at the police department" and after the words "including one of the two photos to the police department and has"

Section 39 Section 6 54 070(A)(2)(b) of the MCL is amended by deleting the words "or other qualified person," at the end of that subsection and further amended by adding the following at the end of the section

If the applicant intends to mail his/her application to the board then he/she shall have his/her local law enforcement agency take his/her fingerprints and photograph and that law enforcement agency shall mail the fingerprints directly to the Metropolitan Police Department.

Section 40. The first full sentence of Section 6.54 070(A)(2)(c) of the MCL is amended by adding the word "his" after the words "Fees If the applicant brings" and before the words "her application to the police department," and further by deleting the second to last sentence in its entirety and substituting the following sentence

This same procedure applies if the applicant has his/her fingerprints and photographs taken by their local law enforcement agency and mailed directly to the Metropolitan Police Department

Section 41. Section 6.54 070(A)(4)(e) is amended by deleting the paragraph in its entirety and substituting in lieu therefore the following.

Whether the applicant previously entertained in this or any other county, city or state under a sexually oriented business license/permit or similar business license/permit within the last year For whom the applicant was employed or associated at the time Whether the applicant has had such a license/permit revoked or suspended within the last year and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation.

Section 42 Section 6.54 070(A)(4)(h) of the MCL is amended by deleting the subsection in its entirety and substituting the following in lieu therefore

A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate

Section 43. Section 6.54 070(B) of the MCL is amended by deleting the words "either by performing these functions or by reviewing these items which were provided by the applicant" before the words "and by performing a background investigation for crimes of a sexual nature" and after the words "fingerprints and 2 x 2 photo" and is further amended by deleting the words and numbers "Subject to Section 6 54 150"

Section 44. Section 6.54 070(C)(1) is amended by deleting the first sentence in its entirety and substituting in lieu therefore the following:

Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and if it determines that the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6 54 010, has not had a similar type of permit/ license revoked in the last year, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit

Section 45 Section 6 54 070(D)(1) of the MCL is amended by adding a new subsection

f If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of that specified time period.

Section 46. Section 6 54 070(E) of the MCL is amended by deleting paragraph 3 and substituting a new paragraph as follows

3 The date the permit was issued.

Section 47. Section 6.54.050(A) of the MCL is amended by adding a new subsection as follows.

5 Any applicant found to have previously violated this chapter of the metropolitan code by providing sexually oriented entertainment within the metropolitan area without a permit as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement The fact that a trial court's judgement is being appealed shall have no effect on the

disqualification of the applicant unless the judgement is stayed

Section 48 Section 6.54.130 of the MCL is amended by adding a new section after (D) and by renumbering the sections accordingly as follows:

Live sexually oriented entertainment shall not be permitted in booths

Section 49. Section 6 54.140(C) of the MCL is amended by adding the words "The distance shall be measured three (3) feet from any outer edge/side of the stage

Section 50. Section 6 54 140 of the MCL is amended by adding three new subsections as follows:

Only one individual shall occupy a booth at anytime No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth No individual shall damage or deface any portion of the booth

Live sexually oriented entertainment shall not be permitted in booths

No customer shall invade the 3 foot boundary from the outer edge of the stage as required to be designated by Section 6.54 050(A)(3)

Section 51 Section 6 54 160(B) shall be amended by deleting the words "A fine" at the beginning of the second sentence and substituting in lieu therefore the words "The five hundred dollar penalty"

Section 52 This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it

Sponsored By. Chris Ferrell

LEGISLATIVE HISTORY

Introduced: July 20 1999

ORIGINAL

METROPOLITAN COUNTY COUNCIL

SECOND SUBSTITUTE

Bill No. BL99-61

An ordinance to amend Title 6, Chapter 6.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

(Filed Dec. 7, 1999)

Introduced _____

Passed first Reading _____

Referred to _____

~~*Amended*~~ SUBSTITUTE BILL INTRODUCED & DEFERRED DEC 7 1999

Passed second Reading DEC 21 1999

Referred to _____

Passed third Reading JAN 19 2000

Approved JAN 20 2000

By [Illegible]
Metropolitan Mayor

Departments Notified _____

Advertised _____

Second Substitute Bill No. BL99-61

An ordinance to amend Title 6, Chapter 6 54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Whereas, the United States District Court for the Middle District of Tennessee, Nashville Division held in the matter of *Déjà vu et al v. the Metropolitan Government et al.,* Docket Numbers 3-97-1066 and 3-97-1176, that the plaintiffs are likely to be successful on their challenge to the sections of the ordinance barring a sexually oriented business from obtaining a license for a period of years because the operator of the business was convicted of the crime of obscenity and the court believes that this prohibition is unconstitutional; and,

Whereas, the United States District Court also held that the plaintiffs are likely to be successful on their challenge to the sections of the ordinance requiring a criminal background investigation of the operators of sexually oriented businesses and entertainers engaged in sexually oriented entertainment because these sections are unconstitutional and they involve an investigation into whether or not the operator or entertainer has been convicted of the crime of obscenity; and,

Whereas, the United States District Court also held that the plaintiffs are likely to succeed on their challenge to the section of the ordinance requiring a fee to obtain a license to operate a sexually oriented business or entertain in a sexually oriented business because that fee includes the cost of a criminal background check of the applicant to determine whether or not that applicant has been convicted of the crime of obscenity and that portion of the fee is unconstitutional; and,

Whereas, the United States District Court held that the plaintiffs are likely to succeed on the merits of their claim that the definition of the terms "sexually oriented" and "sexually oriented theater" were overly broad even though the definitions of the terms "sexually oriented nightclub" and "sexually oriented entertainment" were held to be constitutional and not overly broad by the Court; and

Whereas, though the Metropolitan Government does not concede that barring applicants from obtaining a sexually oriented license or permit because of a prior conviction for the crime of obscenity is unconstitutional, that to conduct a criminal background check to discover if an applicant has been convicted of the crime of obscenity is unconstitutional, that charging the applicants the cost of a criminal background check to discover if the applicants have been convicted of the crime of obscenity is unconstitutional or that the definitions of the terms "sexually oriented" and "sexually oriented entertainment" were overly broad; and

Whereas, it is the Metropolitan Government's objective to resume regulation of the sexually oriented businesses within its jurisdiction without the delays that would most likely occur if the United States District Court's temporary injunction order were appealed; and

Whereas, amending the ordinance to comply with the most recent ruling of the United States District Court will give the Metropolitan Government the opportunity to move to dissolve the temporary injunction and proceed with enforcement of its ordinance as quickly as possible, the following amendments are proposed.

Now therefore, be it enacted by the Metropolitan Council of Nashville and Davidson County as follows:

Section 1. Sections 6.54.010(D) of the Metropolitan Code of Laws (hereinafter "MCL") as amended by 099-1814 is amended by deleting the word "obscenity" from the definition of "Crimes of a sexual nature" before the words "or crimes committed in a jurisdiction" and after the words "patronizing prostitution, promoting prostitution."

Section 2. Section 6.54.010(O) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety.

Section 3. Section 6.54.010(Y) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety and substituting in lieu therefore the following:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture videocassette, slides or other photographic reproduction that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Section 4. Section 6.54.010(Z)(3) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety and substituting the following in lieu therefore:

3. "Sexually oriented theater" is an enclosed building in which films, motion pictures, videocassettes, slides, or other photographic reproductions that are distinguished or characterized by an emphasis on depictions of "specified sexual activities" or "specified anatomical areas," as defined in this section, are regularly presented for observation by patrons therein.

Section 5. Section 6.54.010 of the MCL as amended by 099-1814 is amended by adding a new definition and renumbering this subsection as appropriate.

"Sexually oriented material" shall mean "sexually oriented entertainment" and/or any material, including films, movies, motion pictures, videocassettes, slides, or other photographic reproductions, which regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Section 6. Section 6 54.090 of the MCL as amended by 099-1814 is amended by deleting the words "five hundred" and substituting in lieu therefore the words "three hundred fifty" after the words "A license fee of" and before the words "dollars shall be submitted with the application" and by deleting the words "one hundred" and substituting in lieu therefore the word "fifty" after the words "A permit fee of" and before the words "dollars shall be submitted with the application".

Section 7. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO FORM AND LEGALITY:

/s/ Shayna Abrams
Metropolitan Attorney

INTRODUCED BY:

/s/ Chris Ferrell

Members of Council

Chapter 6.54

SEXUALLY ORIENTED BUSINESSES

Sections:

6.54.010 Definitions.

6.54.020 Sexually oriented business licensing board.

6.54.030 License required.

6.54.040 Application for license.

6.54.050 Standards for issuance of license.

6.54.060 Permit required.

6.54.070 Application for permit.

6.54.080 Standards for issuance of a permit.

6.54.090 Fees.

6.54.100 Display of license or permit.

6.54.110 Renewal of license or permit,

6.54.120 Hours of operation.

6.54.130 Responsibilities of the operator.

6.54.140 Prohibitions and unlawful sexual acts.

6.54.150 Revocation or suspension of license/ permit.

6.54.160 Penalties and prosecutions.

6.54.170 Invalidity of part.

6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Booth" means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common areas of the premises and is used for presenting sexually oriented entertainment including, but not limited to viewing sexually oriented moving pictures or viewing sexually oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein. "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons.

D. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

E. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

F. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

G. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

H. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

I. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

J. "Location" means a single site for which only one use and occupancy permit would be required.

K. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

L. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

M. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

N. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

O. Deleted.

P. "Operator" means any person, partnership, limited partnership, joint venture, corporation or any other type of business entity operating, conducting or maintaining a sexually oriented business.

Q. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

T "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

U. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

V. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

W. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

X. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

Y. "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions means a film, movie, motion picture videocassette, slides or other photographic reproduction that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing

"specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Z. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building in which films, motion pictures, videocassettes,

slides, or other photographic reproductions that are distinguished or characterized by an emphasis on depictions of "specified sexual activities" or "specified anatomical areas," as defined in this section, are regularly presented for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

AA. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

BB. "Sexually oriented material" means "sexually oriented entertainment" and/or any material, including films, movies, motion pictures, videocassettes, slides, or other photographic reproductions, which regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

CC. "Specified anatomical areas" means:

1. Less than completely and opaquely covered;

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

DD. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

EE. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Ord. BL99-61 §§ 1-5, 2000; Ord. 99-1814 §§ 1-5, 1999; Amdt. 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1, 1997;

amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan sexually oriented business licensing board (herein "board").

B. Membership – Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Officers – Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen. The vice-chair is authorized to act

in the place of the chair and in the same capacity as the chair when the chair is unavailable.

D. Meetings – Quorum Required – Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors – Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 with Ord. 99-1814 § 6, 1999; Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.030 License required.

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity which desires to operate more than one sexually oriented business/establishment must have a license for each sexually oriented business/establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15, 1999, or cease operations. All existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 6.54.040(E)(4).

G. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 7, 8, 1999; Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.040 Application for license.

A. Application.

1. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5)(a) through (5)(I) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business that is a corporate entity of any kind: the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation and management of the business. The following persons must be listed in the license application for any sexually oriented business that is a partnership, limited partnership, joint venture, or any other type of business: the name and address of all persons who will be involved in the day-to-day operation and management of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business/adult entertainment license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last year from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within one year for violations of the metropolitan zoning Section 17.64.260;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

6. The applicant shall provide the board with his/her application, a diagram, drawn to scale of the premises, including the location and layout of all booths and stages and the location of the clerk/manager's stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

7. If any of the information on the application changes over the course of the time for which the license is issued, including any changes in the physical layout of the premises, the licensee shall inform the board, in writing, of the changes.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1), 6.54.050 (A)(3) and 6.54.130(C) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes, ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no violations of applicable statutes, ordinances, or regulations, no violations of the provisions of this chapter, no sexually-oriented business/ adult entertainment zoning code violations and/or no applicable criminal history.

2. The code department shall confirm that any booths or stages conform with the submitted diagram and the requirements set out in Sections 6.54.050A and 6.54.130.

3. The police department shall complete its investigation and the codes department and health department shall complete their respective inspections and shall

communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

> The location at ___ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.
>
> The location at ___ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

> The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:
>
> Name Crime Date

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department

and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this chapter and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with this chapter, the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of the events described in this paragraph.

4. In the event the board denied the application in accordance with the provisions of this chapter, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a

license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgment is stayed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.

7. If the board determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.050(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this chapter, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to

comply with applicable statutes, ordinances and regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days, from the end of the initial fifteen days specified subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Wherever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial

thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance, and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with

the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application will be denied.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section. the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied.

a. The request for an extension must be made in writing within fifteen days from the denial.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the initial denial shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). (Ord. 99-1814 §§ 9 – 32, 1999; Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6 – 30, 1999; Ord. 97-1022 §§ 6 – 39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

3. Any live performance of sexually oriented entertainment shall occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. A three-foot boundary from the outer edge of the stage shall be indicated on the floor by a rail, barrier, lighting, luminous tape or paint, or any other method which will make the boundary visible in a darkened condition so that the customer will not invade the three-foot boundary from the stage with any portion of his/her body.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application,. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which

contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on

the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 33 – 35 1999; Ord. 99-1503 §§ 31 – 49, 1999; Ord. 97-1022 §§ 40 – 45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.060 Permit required.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as described in Section 6.54.070(D)(4).

C. Any entertainer found to have previously violated this chapter by providing sexually oriented entertainment in a sexually oriented business, establishment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The

fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 36, 37, 1999; Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a background check in two ways. The applicant brings his/her application, including one of the two photos to the police department and has his/her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the

board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant shall have his/her fingerprints completed by the police department. If the applicant intends to mail his/her application to the board then he/she shall have his/her local law enforcement agency take his/her fingerprints and photograph and that law enforcement agency shall mail the fingerprints directly to the metropolitan police department.

c. Fees. If the applicant brings his/her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints and photographs taken by their local law enforcement agency and mailed directly to the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the last year. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the last year and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and if it determines that the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/license revoked in the last year, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit.

False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation

requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall

file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board; and

3. The date the permit was issued. (Ord. 99-1814 §§ 38 – 46, 1999; Amdt. 1 §§ 4 – 7 with Ord. 99-1503 §§ 51 – 64, 1999; Ord. 97-1022 §§ 48 – 62, 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt. 1 with Ord. 97-796 § 2 (part), 1997)

6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any

material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business

permit revoked within the last year immediately preceding the application.

5. Any applicant found to have previously violated this chapter of the metropolitan code by providing sexually oriented entertainment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 47, 1999; Amdt. 1 § 8 with Ord. 99-1503 §§ 65 – 70, 1999; Ord. 97-1022 § 63 (part), 1997)

6.54.090 Fees.

A. A license fee of three hundred fifty dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned.

B. A permit fee of fifty dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. BL99-61 § 6, 2000; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.100 Display of license or permit.

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours

and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be valid. (Ord. 99-1503 §§ 67(2), 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.110 Renewal of license or permit.

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 6.54.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 6.54.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199___ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit.
>
> _____
> signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for a renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any

denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan governments shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503

§§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64 – 68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.120 Hours of operation.

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any

minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

G. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

H. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

I. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

J. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Ord. 99-1814 § 48, 1999; Amdt. 1 § 10 with Ord. 99-1503 §§ 75 – 84, 1999; Ord. 97-1022 §§ 63 (part), 69 – 73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only

occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

D. Only one individual shall occupy a booth at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. No customer shall invade the three-foot boundary from the outer edge of the stage as required to be designated by Section 6.54.050(A)(3). (Ord. 99-1814 §§ 49, 50, 1999; Ord. 99-1503 §§ 85 – 87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing, an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to

any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee

violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated

Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting.

The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until the administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 1 §§ 11-13 with Ord. 99-1503 § 88, 1999)

6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 §§ 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan

government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

CERTIFICATION

I, Marilyn S. Swing, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of **CHAPTER 6.54** of the Metropolitan Code of Laws as adopted by Ordinance No. BL2004-420.

WITNESS MY HAND and the Seal of the Metropolitan Government of Nashville and Davidson County, Tennessee, this 10th day of December, 2004.

/s/ Marilyn S. Swing
Metropolitan Clerk

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me, by Marilyn S. Swing this 10th day of December, 2004

/s/ Vicki L. Lang
Notary Public

My Commission expires: 03/26/05

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	Case No. 3-97-1066 Judge Nixon Magistrate Griffin
	Consolidated Cases
JERRY C. PENDERGRASS, ET AL. Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE Defendant.	No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND REQUEST FOR HEARING

(Filed Jul. 21, 1998)

Come the defendants, through counsel, and respectfully move this Honorable Court to dissolve the preliminary

injunction previously entered herein, and as grounds therefore state as follows:

On December 8, 1997 the Court entered its Memorandum and Order granting plaintiffs a preliminary injunction against the enforcement of Chapter 6.54 of the Metropolitan Code, commonly known as the Metropolitan Government's Sexually Oriented Business ordinance. (Docket nos. 22 and 23). Since that date, however, two significant events have occurred: an amended version of Chapter 6.54 has now been enacted by the Metropolitan Council, and the Tennessee Legislature passed amendments to T.C.A. § 27-9-111 which have been signed into law by Governor Sundquist. Both of these developments serve to significantly change the operation and effect of Chapter 6.54 from the version that existed when the Court issued its preliminary injunction. Defendants respectfully submit that these two new developments serve to eliminate the provisions of the prior version of Chapter 6.54 which the Court found violated plaintiffs rights to prompt judicial review. Since the defects in the operation and effect of the ordinance have now been cured, defendants submit there are no longer grounds to justify continuing the preliminary injunction, and the injunction should be dissolved.

As an additional ground in support of this motion, defendants invite the Court to consider the fact that plaintiffs have not complied with Fed. R. Civ. P. 65(c) regarding the giving of security before an injunction shall issue.

Defendants respectfully invite the Court to consider the attached memorandum of law, and the following exhibits submitted in support of the instant motion:

1. A copy of amended Chapter 6.54 (Exhibit A); and

2. A certified copy of the amendments to T.C.A. § 27-9-111 (Exhibit B).

Defendants respectfully request a hearing on this motion at the earliest time the Court's docket will allow.

WHEREFORE, defendants ask that this Court grant the instant motion to dissolve the preliminary injunction.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY
JAMES L. MURPHY III, # 9589
DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles # 9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young # 16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103 and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July 1998

/s/ Shayna Abrams
Shayna Abrams

AGENDA

April 27, 1999

9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

[2] APPEARANCES

Mr. James Avril
Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Leslie Shectner
Ms. Linda Borum

* * *

[10] Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

[11] MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's [12] finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

[13] MR. CHAIRMAN: This application is denied.

* * *

[15] The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of those items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide hand towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or [16] approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for the ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

* * *

[26] MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MR. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

[27] MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

[35] The next application is 21 Up Video, 3920 Lebanon Pike

Ms. Borum.

MS. BORUM: We recommend disapproval. It does not comply with zoning. It does not comply with health. Some of those items were: Provide covered trash cans, hot running water and hand towels in the rest rooms.

MS. SCHAFFNER: Am I understanding when you say it doesn't comply with zoning is that it is not within the adult entertainment –

MS. BORUM: It's not within the adult entertainment overlay.

[36] MS. SCHAFFNER: – overlay or is not grandfathered in; is that correct?

MS. BORUM: Correct.

MS. SCHAFFNER: And the health report found that all garbage storage containers didn't have tight fitting lids or covers. There was not hot running water at the hand sink in the rest room. And there weren't individual hand towels in the rest room: is that right?

MS. BORUM: Yes, ma'am, correct.

MS. SCHAFFNER: I move that the application of 21 Up Video at 3920 Lebanon Pike be denied on the basis of not in conformance of the zoning requirements and in addition is in violation of the health code.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on zoning report and the health report. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Okay. The motion carries. This application has been denied.

* * *

[38] Purple Onion I, 2807 Nolensville Pike.

MS. BORUM: We recommend disapproval. Even though they are not in the adult entertainment overlay, they are legally nonconforming, so they do comply with

zoning. They do not comply, though, with the booth requirement, no open sides. Walls not solid. Does not comply with health codes. Some of those items: Clean floors and walls; provide covered trash cans and hot running water.

MS. SCHAFFNER: Where is the – the report from? Who reports on the booths? Codes?

MR. CHAIRMAN: Codes.

MS. BORUM: Yes, ma'am, the building inspector. And that's on the third page, item three and six.

MS. SCHAFFNER: Number three: "Is access unobstructed by any door, gate, lock or any other control-type devices?" He checked no. Also checked no to all walls being solid without any openings, et cetera. In the summary report says it does not comply with the codes; is that correct?

MS. BORUM: Yes, ma'am, that's correct.

MS. SCHAFFNER: And as far as the health report, it says they need to clean the floors and walls in the rest room; provide covered trash containers and tight [39] fitting lids in the bathroom and common area; provide hot running water in the rest room, right?

MS. BORUM: That is correct.

MS. SCHAFFNER: So as far as this checklist goes, in fact, it should be health, no, right?

MS. BORUM: Correct.

MS. SCHAFFNER: And . . .

MS. BORUM: And the building disapproved.

MS. SCHAFFNER: Building disapproved.

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: But the zoning is grandfathered in, correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: I move this application be denied on the basis of the failure to comply with health codes and building codes as contained in the codes inspector's report.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MS. STEVENS: I have a question for legal before we go on.

[40] MR. CHAIRMAN: This application is denied. Okay.

* * *

[45] The next application is Metro News, 822 5th Avenue South.

* * *

[47] MR. CHAIRMAN: Is there any discussions?

MS. STEVENS: I have a question on the health report. What happened to all that stuff that was [48] listed?

MR. BANK: Because they have approved it on the checklist.

MS. STEVENS: Just on the second page, third page.

MS. BORUM: Okay.

MR. BANKS: It said –

MS. BORUM: Yes, I'm sorry. That is disapproved, also for health. I'm sorry, I apologize.

MS. SCHAFFNER: I amend my motion.

MR. STEVENS: Thank you.

MS. SCHAFFNER: I withdraw that motion and move that the application be denied on the basis of the health violations, which include: The floors are not thoroughly cleaned throughout the facility and common areas and rest rooms and booths; walls on the upper floor leading to the booths and stairways were not clean; the lighting was insufficient; the lids and covers on the garbage cans were not tight fitting; there wasn't hot running water in the rest room in the basement and hand towels in the rest room in the basement, women's rest room. And, in addition, that it be disapproved on the basis of the applicant had been convicted of – what is the phrase for it?

MS. SHECTNER: Misdemeanor. Crime of a [49] sexual nature was a misdemeanor.

MS. SCHAFFNER: Misdemeanor crime of a sexual nature. For those reasons, I move it to be disapproved.

MR. BANKS: Mr. Chairman, could I ask one more question? On the guideline, if you'll turn the diagram. The bottom left it says, "Doors to video booths will be removed upon submission of license application." That may or may not have been done. I do know that on this diagram all the booths had doors on them.

MS. BORUM: The inspector's report is the fifth page.

MR. BANKS: I just needed something that says – okay. We didn't know we had that.

MS. BORUM: The summary report, "The business located complies."

MR. BANKS: Okay. So that we would refer to the building report, right?

MS. BORUM: That is right.

MR. CHAIRMAN: The motion you have before the board is that this application be denied based upon the background report of a misdemeanor sexual offense as well as the health inspector's report.

MS. STEVENS: Second.

MR. CHAIRMAN: Okay. All in favor – it [50] has been moved and seconded that we – all in favor signify by saying "aye."

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This motion carries. This application is denied.

* * *

SEXUALLY ORIENTED BUSINESS LICENSING BOARD
NOTICE OF DECISION ON APPLICATION
APRIL 28, 1999

TO: **Mr. Michael Rucker**
C/o Deja Vu of Nashville
1214 Demonbreun Street
Nashville, Tennessee 37203

FROM: **The Sexually Oriented Business Licensing Board**

SUBJECT: **Decision of the Board on Your Application for a License**

DATE: **April 28, 1999**

The Sexually Oriented Business Licensing Board ("Board") met to consider your application for a license to operate a sexually oriented business on Tuesday, April 27, 1999. The Board denied your application for the following reasons:

1. Failure to comply with required health standards set out below:

   a. Unclean couches, restroom walls and fixtures, and shower stalls.

   b. Repair commode, provide covered waste containers.

   This failure to comply is in violation of Metropolitan Code of Laws § 6.54.040(C)(9).

2. Violation of 3-foot distance requirement.

   This failure to comply is in violation of Metropolitan Code of Laws § 6.54.140(C).

3. The Board also adopted a definition of the term "booth" which includes "any compartment, room, cubicle, stall or any other enclosure separate from the

> common areas of the premises. Your establishment will be re-inspected by the Board's Inspector to determine if it does in fact have booths. If booths are present, then they must conform with the requirements of Metropolitan Code of Laws § 6.54.050(A). Live performances must conform with Metropolitan Code of Laws § 6.54.140(C).

Your statement in your application that you are not providing a diagram based upon Ms. Abrams' representation at the March 26, 1999, federal court hearing, where she stated that "the booth regulations and diagram requirements did not apply any longer to cabarets and nightclubs" will not suffice. Your statement indicates that you may have misunderstood what Ms. Abrams was attempting to convey to the court. Booth requirements are unique to booths. Metropolitan Code of Laws § 6.54.050(A). They do not apply throughout the dance establishment, but only to the booths themselves. The fact that an entertainer may be providing a live performance inside a booth, and violating § 6.54.140(C), does not transform the booth into a "cabaret" or "nightclub" such that the booth requirements do not apply. What Ms. Abrams actually said in the hearing was in response to your counsel's statement that, "My client's club has carpeting, it's dark carpet. The ordinance requires a light floor." The court asked, "What's the rationale for a light piece of carpet rather than a dark piece of carpet?" Ms. Abrams responded, "Your Honor, actually just to correct, I believe counsel for the plaintiff misspoke. As to dance establishments, that is not the requirement. That is the requirement for the booths, places where you view movies need to have light-colored non-absorbent walls and floors." As Mr. Shaffer himself later acknowledged in the hearing, "What the ordinance would prohibit is dancing inside the booth because you can only have one

person in the booth. You cannot have a customer and a dancer." You must submit a diagram indicating how your booths are currently located in accordance with Metropolitan Code of Laws § 6.54.040(A)(6), if sexually oriented entertainment is provided in the booths.

Because your application has been disapproved, you may elect to do the following:

1. *Within five (5) days of the disapproval* **(May 3, 1999)**, you may request, in writing, an evidentiary hearing before the Board. If you request an evidentiary hearing, it will be held **May 11, 1999**.

2. *Within fifteen (15) days of the disapproval* **(May 12, 1999)**, you may make a written request to be allowed more than fifteen (15) days in which to cure the violation(s). An applicant will only be granted an extension to cure the violation(s) if the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the Board determines that the applicant has demonstrated a good faith effort to cure the violation(s) in a timely manner. The request for an extension would be heard at the Board's next regular meeting, either **May 11, 1999** or **June 1, 1999**, depending on when the Board has received your request for an extension.

3. *Within fifteen (15) days of the disapproval* **(May 12, 1999)**, you may request reinstatement of the application by notifying the Board that you have cured all violations and by requesting that the business be re-inspected. Re-inspection reports will be filed with the Board and considered at the next regular meeting following the filing of the re-inspection report(s), either **May 11, 1999** or **June 1,**

1999, depending on when you notify the Board that you have cured all the violations.

4. You may immediately appeal the Board's denial to the circuit or chancery court.

If you believe that your application was wrongfully denied or that you intend to come into compliance with the requirements for a license, you are encouraged to make a written request for an evidentiary hearing before the Board by **May 3, 1999** (Option No. 1). You must make this request in order to preserve your right to the evidentiary hearing. If you do not make such a request within five (5) days of the disapproval, you will have forfeited your right to an evidentiary hearing before the Board.

AGENDA

May 11, 1999

7:30 a.m.

METROPOLITAN ADULT
ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

[2] APPEARANCES

Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Shana Abrams
Ms. Linda Borum

* * *

[18] MS. SCHAFFNER: If the board were to give you some time to look into that, would you be willing to waive your time limits in writing?

KEN MERONEY: I need to ask counsel about that.

[19] UNKNOWN ATTORNEY: No!

MR. CHAIRMAN: Basically, we have the report from the codes inspector and the board's inspector.

Is there a motion from the board to approve the application? Is there a motion from the board to deny the application?

MS. SCHAFFNER: I move it be approved.

MR. CHAIRMAN: It has been moved. Is there a second that this application be approved? Is there a second?

MS. SCHAFFNER: It fails for want of the second; motion fails.

MR. CHAIRMAN: Motion fails for one of the second.

MS. STEVENS: Chairman, could I entertain a motion for it to be denied?

MS. BORUM: Could y'all all speak a little bit louder?

MR. CHAIRMAN: Your motion is what?

MS. STEVENS: I move, based on the codes report, based on the same reason that the motion was not ratified, it is still a booth and was not changed, and I move that the permit be denied.

MR. CHAIRMAN: We move that the permit be [20] denied on the basis of the codes inspector's report.

MS. STEVENS: And on the basis of the wall not being removed on the second floor.

MR. CHAIRMAN: There's a motion on the floor that the application be denied, the re-inspection application be denied. Is there a second?

MR. BANKS: I second that.

MR. CHAIRMAN: Is there any further discussion? All in favor that this application be denied signify by saying aye.

MR. BANKS: Aye.

MS. STEVENS: Aye.

MS. SCHAFFNER: Oppose

MR. CHAIRMAN: Two ayes, one oppose. Two to one opposed. So the motion is denied. Motion passes that this application be denied. The motion passes that this application be denied. The motion passes that this application be denied by a vote of two to one.

Let's move on to the next application.

* * *

METROPOLITAN ADULT ENTERTAINMENT BOARD
HEARING
700 Second Avenue South
Howard Office Building
Nashville, Tennessee 37201

Hearing: May 25 1999
Time: 9:00 a.m.

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., CCR, CRI
Bachelor's Degree of Court Reporting
806 Porter Road
Nashville, Tennessee 37206

(615) 262-9592

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[2] APPEARANCES

BOARD MEMBERS PRESENT

MR. DONALD BOATRIGHT, Chair

MS. MARY MARTIN SCHAFFNER, Vice-Chair

MR. ALAN BANKS, SR.

REV. BECCA STEVENS

APPEARING FOR METRO

MS. SHAYNA ABRAMS

MR. JAMES CHARLES

* * *

[47] DR. BOATRIGHT: Okay. It's been moved and seconded that we issue Ken's Gold Club an ordinance.

MR. CHARLES: A license.

DR. BOATRIGHT: A license. All in favor signify by saying 'aye'.

MR. BANKS: Aye

MS. SCHAFFNER: Aye

[48] DR. BOATRIGHT: All – nay?

MS. STEVENS: Nay.

DR. BOATRIGHT: It's two to one. The motion carries.

* * *

[80] DR. BOATRIGHT: Thank you for your arguments. The Board will entertain a motion for approval.

MS. SCHAFFNER: I move that it be approved. In support of that I would like to say that I think – I continue to believe there is ambiguity about what booths are in the ordinance, which I fervently hope will be addressed.

While there is ambiguity, I think that we are obligated to rule in favor of the applicants and their rights and let the ambiguity be clarified by Metro, if it is the intent of the Metro Council to prohibit. At this point I don't think that this is sufficiently clear, and for that reason I move that it be approved.

[81] DR. BOATRIGHT: Is there a second?

(No response heard.)

DR. BOATRIGHT: Any discussion?

(No response heard.)

DR. BOATRIGHT: Okay. The motion failed for second and Deja Vu's license is denied on appeal.

MR. RUCKER: Thank you for your time.

THE CLERK: I need a motion to deny it.

DR. BOATRIGHT: Okay. Is there a motion to deny the application?

MR. BANKS: I make the motion to deny the application.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes.

DR. BOATRIGHT: All in favor of denying?

MS. SCHAFFNER: Can I ask your reason?

MR. BANKS: I believe under the definition in the ordinance, it would be remiss of me to look at this and say this is not a booth. I believe it is a booth, and I believe there can only be one person in a booth.

MS. SCHAFFNER: But what is the definition of booth you are using to base your judgment on?

MS. STEVENS: Well, what I was using partly was – when everyone was talking, you described these club areas; and, secondly, it seems like if they are saying, [82] yes, we comply because we don't have this wall here, then it makes sense that you're talking about a booth. That's

what everybody has been talking about the whole time we've been talking about it.

It seems like to me, as a Board member who is not from the legal profession, the best I can do is go by what my understanding of it is and go by the representations of the legal counsel we have been given.

MR. BANKS: Are these rooms, are these cubicles, are these closets, or are they booths?

MS. SCHAFFNER: I was just asking what definition you are using to call these booths?

MR. BANKS: These are separated from the general area. When – the other gentleman said, 'You know, this is really open and it's really just a part of the overall room; that you go in and' – I would assume if you do a table dance, you're going to pay for a private table dance. And I couldn't just walk up – walk in there and sit right next to somebody who paid for a private table dance. No, this is separated – a separated area from the general part of the – of the entertainment establishment; and, therefore, to me it's either a room or a booth, and I don't consider these rooms.

MS. SCHAFFNER: Okay.

MR. BANKS: And only one person can be in a [83] booth.

MS. STEVENS: I totally would love to have some clarification of this ambiguity cleared up, because it's very confusing.

DR. BOATRIGHT: Now, is there a second?

MS. STEVENS: Of what? For a motion to – we did it.

DR. BOATRIGHT: All right. She did it.

All in favor of denying the application signify by saying 'aye'.

MR. BANKS: 'Aye'.

MS. STEVENS: 'Aye'.

DR. BOATRIGHT: All in favor of.

MS. STEVENS: All opposed.

DR. BOATRIGHT: All opposed to the motion signify by saying 'nay'.

MS. SCHAFFNER: Nay.

DR. BOATRIGHT: Nay.

MS. STEVENS: Are you voting nay?

MS. SCHAFFNER: Well, I don't think you can vote acceptable.

MS. STEVENS: Can he vote?

MS. ABRAMS: (Shakes head negatively.)

DR. BOATRIGHT: It's two to one.

MS. STEVENS: The other thing I would like to [84] have on the record is what happened to the other Board member.

MS. SCHAFFNER: We have something else on the agenda.

MS. STEVENS: We do? What?

DR. BOATRIGHT: Another motion, Miko's.

MS. SCHAFFNER: Wait a minute. Okay.

DR. BOATRIGHT: Last thing – last item on the agenda is Miko's located at the 511 8th Avenue North. It was present at the last meeting. There was a request for withdrawing that application. Any change on that?

MR. KIRKLAND: I have not had any further communication from anyone, so I don't have anything further to offer this Board. I have not heard from Ms. Hunter. I have heard from Mr. Lynch. I have no reason to dispute Mr. Lynch's representation that he represents Ms. Hunter.

MS. SCHAFFNER: I would move that we withdraw.

MS. STEVENS: Seconded.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes, sir.

DR. BOATRIGHT: All in favor signify by saying 'aye'.

(WHEREUPON, responses of 'aye' were heard.)

[85] DR. BOATRIGHT: Okay. Motion carries.

* * *

Sexually Oriented Business Licensing Board
700 2nd Avenue South
Nashville, TN 37201
615-862-6556

May 26, 1999

Mr. Mike Rucker
c/o Deja Vu
1214 Demonbreun Street
Nashville, TN 37203

Dear Mr. Rucker:

The Sexually Oriented Business Licensing Board met to consider your license application denial in response to you request for an evidentiary hearing on your previously denied application for a license to operate a sexually oriented business. This evidentiary hearing was held on Tuesday, May 25, 1999.

The Vice Chair made a motion to grant the application which failed for lack of a second. A board member then made a motion to deny the license application which received two votes for denial and two votes against denial.

Section 6.54.020(D)(3) states "The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits." Since the tie vote of two to two is not a "concurring vote of the majority". The license was neither approved or denied. Section 6.54.040(E) specifies that the Board must hold the hearing at the next regular meeting at which they shall affirm or reject the denial of the application.

Section 6.54.040(C)(3) states "If the board fails to meet in the time period specified or fails to have a quorum at the meeting, then the license shall be approved and sent to the applicant by United States Mail to the address listed on the application." Since the Board did not act on your application within fifteen days of your request for an evidentiary hearing, the license is granted.

/s/ Mary Martin Shaffner
Mary Shaffner, JD,
Vice Chair

Very truly yours,

/s/ Linda Borum w/permission
Linda J. Borum
Secretary, Sexually Oriented
Business Licensing Board

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)
Plaintiffs,	)
vs.	) Civil No. 3:97-1066
METROPOLITAN GOVERNMENT, et al.,	) Judge Higgins
Defendants.	) Magistrate Judge Griffin
and	(consolidated cases)
JERRY C. PENDERGRASS, et al.,	)
Plaintiffs,	)
vs.	) Civil No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	) Judge Higgins
Defendant.	) Magistrate Judge Griffin

AFFIDAVIT OF JOHN E. HERBISON IN SUPPORT OF CO-COUNSEL'S REQUEST FOR INTERIM ATTORNEYS' FEES

State of Tennessee)
County of Davidson)

JOHN E. HERBISON, being duly sworn according to law, makes oath as follows:

1) I am an attorney licensed to practice law by the state of Tennessee since 1987. I am a member in good standing of the bar of this Court, the Supreme Court of Tennessee, the United States Court of Appeals, Sixth Circuit, and the United States Supreme Court.

2) Along with H. Louis Sirkin of the Ohio bar, I represent the Plaintiffs before this Court in the *Pendergrass* matter, that is, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

3) Since approximately 1988 I have been continuously retained by Mr. Pendergrass individually in regard to representation of adult entertainment businesses with which Mr. Pendergrass is associated. I have been continuously retained by The 822 Corporation since that business was incorporated in 1992. My participation in the instant lawsuit is pursuant to these retainer agreements.

4) My fee arrangements with Mr. Pendergrass and The 822 Corporation for professional services include the regular payment of a monthly, flat fee. I have accordingly not billed my clients by the hour for my time in the instant lawsuit, and, because I have not kept contemporaneous time records, I have elected not to submit a request for an award of interim fees in this matter.

5) The substantive work which I have done on this lawsuit, *e.g.*, legal research, drafting pleadings and motions, appearing in court, participating in discovery, etc., has been performed pursuant to the above-described retainer. As the only Plaintiffs' attorney in this action based in Nashville, however, I have performed services benefitting all of the Plaintiffs in the consolidated cases, for example, filing certain documents, serving documents on opposing counsel, procuring and serving subpoenas,

coordinating scheduling of telephone conferences, etc. To the extent that these services have benefitted parties other than those by whom I am retained, I have not charged these parties for my time. It is my opinion and belief that my attending to these logistical matters has reduced the number of hours which would otherwise have been expended by co-counsel for the *Pendergrass* Plaintiffs and both counsel for the *Deja Vu* Plaintiffs, for which these counsel likely would have billed and sought a greater amount of fees under 42 U.S.C. § 1988 had I not performed such services.

FURTHER THE AFFIANT SAITH NOT.

/s/ John E. Herbison
JOHN E. HERBISON

Sworn to and subscribed before me this 10th day of June, 1999.

/s/ [Illegible]
NOTARY PUBLIC

My Commission expires: 3/24/01

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Aleta Trauger Magistrate Judge Griffin
Defendants.	)	
		Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Aleta Trauger Magistrate Judge Griffin
Defendants.	)	

AFFIDAVIT OF H. LOUIS SIRKIN IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL MOTION FOR ATTORNEYS' FEES

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

H. Louis Sirkin, being duly sworn, deposes and states as follows:

1. I am an attorney at law admitted to practice in the State of Ohio, the United States District court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

2. I graduated from the University of Cincinnati Law School in 1965. I was admitted to practice law in Ohio in 1965.

3. Currently, I am a partner at the law firm of Sirkin, Pinales, Mezibov & Schwartz. My law practice today and for many of the previous years has involved federal court and civil rights litigation. I have litigated numerous cases involving civil rights, the First Amendment, and criminal defense. I have tried cases in state and federal court and argued cases before the Sixth Circuit Court of Appeals. I am a fellow of the American College of Trial Lawyers.

4. I am seeking fees at the rate of Two Hundred Twenty-five and No/100 Dollars ($225.00) per hour in this case based in part on the examination of similar awards to comparable attorneys practicing law in this jurisdiction.

5. The time sheets attached are an accurate representation of the services performed on behalf of the plaintiff, Jerry Pendergrass, et al., in the appeal of this case. The records are kept contemporaneously with the services that have been performed.

6. Billing judgment was exercised at the time the work was originally entered so that not all time for a particular service was recorded.

7. The total number of hours expended by Plaintiffs' attorneys to defend the appeal in this case was reasonable.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ H. Louis Sirkin
H. Louis Sirkin
(Ohio Bar No. 0024573)

Sworn to and subscribed before me, a Notary Public, this 11 day of June, 1999.

/s/ John Feldmeier
Notary Public
My Commission
Expires: ___

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1066 Judge Higgins
	Consolidated Cases
JERRY C. PENDERGRASS, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1176 Judge Higgins

AFFIDAVIT OF BRADLEY J. SHAFER IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY FEES

Bradley J. Shafer, being first duly sworn, deposes and states as follows:

1. I am an attorney at law admitted to practice in the States of Michigan and Arizona; the United States

District Courts for the Eastern and Western Districts of Michigan; the United States Courts of Appeals for the Fourth, Sixth, Seventh and Ninth Circuits; and the Supreme Court of the United States.

2. I was graduated, *cum laude*, from Thomas M. Cooley Law School in 1984. I was admitted to practice law in the State of Michigan in 1984, and in the State of Arizona in 1985.

3. Currently, I am the senior partner and principal owner of the law firm of Shafer & Associates, P.C. For the past ten years, my law practice has primarily consisted of state and federal court litigation in the areas of constitutional law, civil liberties, and civil rights. I have actually practiced in these areas, however, for the entirety of my legal career of almost 15 years, as well as during two years of law clerking. Within these areas, my specialty has been First Amendment rights as it pertains to adult entertainment. I have tried numerous cases in both state and federal courts in these areas, and have extensive appellate experience concerning these constitutional issues. I was counsel for three of the respondents in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and currently have a petition for a writ of certiorari pending arising out of another case from this Court. I am currently vice-president, and president-elect, of the First Amendment Lawyers Association; a national bar association of attorneys who specialize in First Amendment litigation. H. Louis Sirkin, counsel for the Pendergrass Plaintiffs here, was a previous president of the First Amendment Lawyers Association.

4. I have received admission to appear as counsel pro hac vice in constitutional litigation matters in various federal district courts, including those for the Western

District of North Carolina, Charlotte Division; the Western District of Tennessee; the Western District of Washington; the Southern District of Iowa; the Middle District of Tennessee; the Middle District of Florida, Ft. Myers Division; the Southern District of Indiana; and the Northern District of Indiana.

5. In addition, I have also received permission to appear as counsel pro hac vice in various state trial and appellate courts, in such states as Washington, Ohio, Texas, Indiana, Missouri, California, North Carolina, Massachusetts, Minnesota, New Jersey, Iowa, and Florida.

6. I practice First Amendment law on a national basis, and my standard rate for hourly clients in First Amendment litigation matters wherever I practice is $175.00 per hour. This is actually a low hourly rate. I am personally aware that other similarly qualified First Amendment attorneys are regularly compensated at hourly rates from between $200.00 to $375.00 per hour.

7. I have litigated cases previously both in this Court and in the United States District Court for the Western District of Tennessee. I have become familiar with what similarly experienced First Amendment attorneys charge in Nashville and throughout the State of Tennessee, such as my co-counsel, Michael Pleasants, and $175.00 per hour is a reasonable prevailing market rate in this community.

8. The time sheets attached hereto as Ex. A are an accurate representation of the services performed by my firm on behalf of the Plaintiffs in this case. The records are kept contemporaneously with the services that have been performed. The matters that have been redacted from the bills are matters that I believe are inappropriate to claim as attorney fees at this stage of the proceeding in regard to

an interim request. By deleting these charges, Plaintiffs do not waive any claim of entitlement to reimbursement for them at a later time. When I have redacted out hours expended, I have reduced commensurately the hours charged by designating the redacted time with the notation of "n/c" standing for "no charge." The same designation applies for time which I have simply exercised billing judgment by not charging, although no corollary billing entries are redacted.

9. In addition, attached hereto as Ex. B is a ledger of the out-of-pocket expenses and costs that my clients incurred in regard to the legal representation that my firm has afforded to them. These costs and expenses were actually incurred, actually billed to the clients, actually paid by the clients, were necessarily incurred, and are reasonable. Ex. B references law clerk expenses for legal research. Consistent with my fee agreement with my clients, law clerk time is billed at $17.00 per hour, and is reflected as a cost on Ex. B as opposed to itemized legal time on Ex. A. The law clerk rate of $17.00 per hour is far below the normal rates that law firms charge clients, which is usually billed at the rate of $40.00 per hour or more.

10. The attached billings reflect time expended by five attorneys who either worked in, for, or on behalf of my office in this matter. The bills designate them by initials, and these people are identified as follows:

Initials	Name	Hourly Rate
BJS	Bradley J. Shafer	$ 175.00 per hour
SMG	Scott M. Goldstein	$ 125.00 per hour
AKW	Andrew K. Wilkins	$ 125.00 per hour
ASR	Allan S. Rubin	$ 150.00 per hour
AIB	Amy Burgess	$ 125.00 per hour

The hourly rates ascribed to each one of these attorneys is commensurate with their skill level.

11. Billing judgment was exercised at the time the work was originally entered so that not all time for a particular service was recorded as a billable charge. While all time expended by the attorneys in my office for legal work on this case has been recorded, I have exercised billing judgment in not specifically charging all of that time, particularly concerning the significant research that was necessary in order to litigate both the first and second motions for preliminary injunction.

12. All four groups of Plaintiffs' attorneys coordinated in the handling of this litigation in order to ensure that there was either no or minimal duplication of effort. While we have shared briefing tasks, my office has been primarily responsible for acting as lead counsel on this case and has been responsible for a majority portion of briefing. Accordingly, that is why the bills from my office are substantially greater than the other attorneys involved.

13. The total number of hours expended by the plaintiffs' attorneys in this case is reasonable, and reflect the fact that this was (and is) a complicated and difficult case involving many different areas of constitutional and First Amendment law. They also reflect that this case has progressed over a period of over 2 ½ years, during which time the Defendants have vigorously contested and opposed all of the plaintiffs' claims of unconstitutionality, in spite of the fact that the Defendants later made almost 100 amendments to cure constitutional deficiencies in the ordinance as either pointed out by this Court in its Order granting the first motion for preliminary injunction, or as

pointed out by the Plaintiffs' in their comprehensive and extensive second motion for preliminary injunction.

14. The total number of hours expended by my firm prior to the filing of the initial complaint and the first motion for preliminary injunction are large for two reasons. First, my firm was retained in this matter before Ch. 6.54 was even enacted. Accordingly, we began research and briefing when the first version of the ordinance was proposed. Additional research, briefing, and revisions to briefing, was necessary when various amendments were added to the Bill before it was ultimately enacted as Ch. 6.54. In addition, because we were not certain as to how quickly the ordinance would take effect after it was enacted, and we therefore did not know how long we had to prepare a lawsuit, have it filed, and have a preliminary injunction motion ruled upon before the ordinance became effective, we were required to be prepared with pleadings long before the ordinance was enacted. Second, Ch. 6.54 is an extremely comprehensive, detailed, and lengthy ordinance that required new research and briefing on a wide-range of constitutional issues. Plaintiffs were intending to brief all of the various constitutional challenges in the first motion for preliminary injunction until Plaintiffs' counsel received correspondence from Shayna Abrams, one of the defense attorneys in this litigation, stating that compliance with the non-licensing provisions of Ch. 6.54 did not have to occur until a business actually obtained a license. Accordingly, if the licensing provisions were unconstitutional (which turned out to be the case because of the lack of prompt judicial review and the failure to maintain the status quo during appellate remedies), there was no need to challenge the non-licensing provisions of the ordinance at that time. As a result of receiving the correspondence

from Ms. Abrams, we deleted in our briefing on the first preliminary injunction motion all constitutional challenges to the non-licensing provisions of Ch. 6.54. Those arguments were, however, ultimately finished, appropriately fully briefed, and then incorporated into the second motion for preliminary injunction.

15. On January 27, 1999, the Honorable Aleta A. Trauger, the District Court Judge assigned to this case at that time, conducted a hearing which was to be on Plaintiffs' second motion for preliminary injunction. That hearing never occurred as after some initial comments by counsels, Judge Trauger recused herself from all further proceedings in this matter. However, prior to the commencement of the hearing, I handed defense counsels two affidavits which I had intended to file under seal that day. Those affidavits are attached hereto as Ex. C, and outline the experiences of two entertainers who attempted to undergo fingerprinting for the permitting process of Ch. 6.54. Because Judge Trauger recused herself and did not entertain argument on the preliminary injunction motion, I never actually filed those affidavits with this Court. However, the amendments to Ch. 6.54 which were enacted after the aborted hearing on January 27, 1999, contained specific revisions to the fingerprinting process so as to deal with the concerns outlined in the two affidavits.

FURTHER AFFIANT SAITH NOT.

Dated: June 14th, 1999 /s/ Bradley J. Shafer
Bradley J. Shafer

Subscribed and sworn to before me by Bradley J. Shafer, on this 14th day of June, 1999.

/s/ Danielle S. Stewart
Danielle S. Stewart,
Notary Public
Shiawassee County,
Acting In
Clinton County, Michigan
My Commission Expires:
June 27, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,	)	
Plaintiffs,	)	No. 3-97-1066
v.	)	Judge Higgins
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department	)	
Defendants,	)	
v.		Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)	
Plaintiffs,	)	
v.	)	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Higgins
Defendants.	)	

AFFIDAVIT OF MICHAEL F. PLEASANTS IN SUPPORT OF APPLICATION FOR ATTORNEY'S FEES

STATE OF TENNESSEE

COUNTY OF SHELBY

COMES NOW the Affiant, Michael F. Pleasants, and having been duly sworn, deposes and says as follows:

I am a licensed attorney in the State of Tennessee and have been practicing as such since 1967. I have also been admitted to the practice before the U.S. District Court for the Western and Middle Districts of Tennessee. I am co-counsel, along with Mr. Bradley J. Shafer of the Michigan Bar for Deja Vu of Nashville, Inc., and the other Plaintiffs in the above entitled case. I, Mr. Shafer and our associate attorneys have made every effort to avoid redundancy or duplication of services in the representation of our clients. Mr. Shafer and his staff have prepared the bulk of the pleadings and memoranda filed in this case, though frequently, I reviewed them prior to filing and made suggestions for their improvement. I and my associate, attorney David Lumb, were primarily responsible for researching and drafting matters which particularly dealt with Tennessee Law, i.e. the scope of review afforded by the Writ of Certiorari and Supersedeas, supposedly available to persons dis-satisfied with an action of the Davidson County Metropolitan Board of Sexually Oriented Businesses.

Some apparent duplication of time exists with respect to depositions of the Metro Davidson County Officials and necessary Court appearances. The scope of the Metropolitan Ordinance complained of in the instant lawsuit is very

broad and Mr. Shafer and I worked together in preparation for such depositions and in taking them. While Mr. Shafer was the interrogator in most of the depositions, I assisted him in preparation and in prompting him for area of questioning and documentation, as he did for me in the Depositions in which I was the interrogator. This contributed to the efficient conduct of these depositions.

Also, in joint appearances at Court sessions, most particularly, the hearing on Plaintiff's Second Motion for Preliminary Injunction, we divided the preparation and taking of testimony from witnesses in order to more efficiently utilize the Court's time. This operated to the benefit of Metropolitan Government by not unduly prolonging the hearing, which otherwise might have resulted.

Mr. David Lumb, an attorney in my office who performed certain research under my supervision, has been practicing since 1987 in the State of Tennessee. Mr. Lumb's time was billed on this matter at the rate of $150.00 (One Hundred Fifty Dollars and no/100) per hour and mine was billed at the rate of $175.00 (One Hundred Seventy Five Dollars and no/100). I have had extensive experience in matters involving First Amendment Law application and litigation since the early 1970's in Federal and State Courts in Tennessee and elsewhere. I am familiar with the prevailing rates for attorney's fees with like experience in the Nashville market area, and the rates of $175.00 for my time and $150.00 for Mr. Lumb's time are at or below current market rates.

Additionally, I am very familiar with the work and legal experience of Mr. Bradley J. Shafer, and have worked with him on this litigation, other litigation in the middle District of Tennessee, as well in the Western District of

Tennessee. He is extremely well versed in First Amendment matters. It is my understanding that he is requesting compensation in the Application for Attorney's Fees, for which this Affidavit is submitted in support at the rate of $175.00 per hour. I believe that this hourly rate is well within the prevailing rates for attorney's fees of like experience in the Nashville market area and is probably below the current market rates in either Memphis or Nashville, Tennessee.

I believe that the rates requested for all the attorneys mentioned in my Affidavit are in accord with rates prevailing in the Nashville market and that the hourly rates requested by me, Mr. Lumb and Mr. Shafer in this cause are at the low end of the scale in the community for Nashville attorneys of like experience and ability.

Copies of the detailed billings for time spent on this case from June 19, 1997 until February 24, 1999 and expenses incurred or advanced are attached hereto and incorporated herein as collective Exhibit "A".

The fee for my services, and that of Mr. Graves and Mr. Lumb have been calculated through February 24, 1999. Time after that date was spent in matters related to the case for which no fees are claimed at this time. My time records reflect that I devoted a total of 158.2 hours through February 24, 1999 at the rate of $175.00 per hour, for a total of $27,685.00. Mr. Frierson M. Graves' time spent was 9.25 hours in preparation of the Complaint and advice regarding it's format. At his rate of $175.00 per hour, the total of his fees is $1,618.75. Mr. David Lumb spent a total of 15.7 hours almost entirely in research on the Tennessee Certiorari issue and in drafting of the

Memorandum regarding this issue. At the rate of $150.00 per hour, the amount for his time is $2,355.00.

The expenses billed for which reimbursement is sought total $2,862.88.

In the billing of November 12, 1997, expenses charged for filing fees, service of process fees, copying, travel and shipping charges, totaling $511.61, expenses billed on December 10, 1997, were for travel, postage and shipping and totaled $357.85. The expenses billed on March 20, 1998, were for shipping and travel/lodging expense totaling $420.99. The billing of June 22, 1998, includes telephone charges, postage and shipping totaling $161.25. The billing of October 15, 1998, include shipping and telephone charges for a total of $261.02. The billing of January 6, 1999, includes travel, lodging, telephone and shipping, totaling $1,280.16. No expenses are claimed in the fee application for the statement of May 10, 1999.

The billings attached as collective Exhibit "A" accurately reflect the time and nature of the services performed, and all directly relate to prosecution of the lawsuit resulting in the modifications to the Ordinance made by Nashville, Davidson County Metropolitan Government. The total of legal fees described in collective Exhibit "A" is $31,658.75 for a total of fees and expenses of $34,521.63.

AND FURTHER AFFIANT SAYETH NOT.

/s/ Michael F. Pleasants
Michael F. Pleasants

SWORN TO AND SUBSCRIBED before me this 14th day of June, 1999.

/s/ Susan Michelle Walker
NOTARY PUBLIC

My Commission expires:
My Commission Expires Apr. 12, 2003 [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*,	
Plaintiffs,	Case No. 3-97-1066
v.	Judge Higgins
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,	
Defendants.	
	Consolidated Cases
JERRY C. PENDERGRASS, *et al.*,	
Plaintiff,	No. 3-97-1176
v.	Judge Higgins
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	
Defendant.	

DEFENDANTS' MEMORANDUM OF LAW
IN RESPONSE TO PLAINTIFFS' BRIEF
FOR ATTORNEYS' FEES

(Filed Aug. 16, 1999)

Interim attorneys' fees are not regularly awarded unless there has been an entry of any order that determines

substantial rights of the parties. In this case the only such order is the granting of the plaintiffs' first motion for a preliminary injunction which occurred December 3, 1997. Any fees and costs accrued after this date cannot be recovered because they have not resulted in an order determining the substantial rights of the parties. Even assuming the catalyst rule applies to a request for interim fees, the plaintiffs cannot use the catalyst rule unless they have prevailed on any significant issue in this litigation either through court order, settlement or through changing the behavior or policies of the defendants in a way which benefits the

* * *

inspection argument is within the pages discussing collateral estoppel an issue this Court has not yet ruled on, and eleven (11) pages discuss the still contended issue of live performances in booths. Not including the yet undecided booth or collateral estoppel issues, plaintiffs used eighteen and one-half (18½) pages of the one hundred and seventy-two page (172) brief to discuss issues on which they claim to have been successful. This represents only ten percent (10%) of the brief and any fees awarded should reflect that percentage.

CONCLUSION

If the Court determines that plaintiffs request for interim attorneys fees was timely, they are certainly the prevailing party as to the grant of plaintiffs' motion for a preliminary injunction, and as to that injunction, plaintiffs are entitled to $72,105.23 (Mr. Shafer – $58,550.77, Mr. Pleasants – $10,966.96, Mr. Sirkin – $2,587.50) in interim attorneys' fees. The Court should not address the remainder

of plaintiffs interim attorneys' fees request because they will not be ripe until the Court has ruled on the plaintiffs' second motion for a preliminary injunction. If the Court were to address these later issues now under the catalyst rule Mr. Shafer might, at most, be entitled to an additional $3,182.08 in interim attorneys' fees. The Defendants argue that it is improper to award any of the later fees until the Second Motion for a Preliminary Injunction is decided.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
JAMES L. MURPHY III,
9589, DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles # 9007
Associate Director of Law

/s/ Francis H. Young by JLC
Francis H. Young # 16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to John Herbison, 2016 Eighth Avenue South,

Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 16th day of August, 1999.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE INC., et al.,	
Plaintiffs,	
vs.	Civil No. 3:97-1066
THE METROPOLITAN GOVERNMENT, et al.,	Judge Higgins Magistrate Judge Griffin
Defendants.	
and	
JERRY C. PENDERGRASS, et al.,	(consolidated cases)
Plaintiffs,	
vs.	Civil No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	Judge Higgins Magistrate Judge Griffin
Defendant.	

AFFIDAVIT OF JOHN E. HERBISON IN SUPPORT OF CO-COUNSEL'S REQUEST FOR ATTORNEYS' FEES

State of Tennessee)
County of Davidson)

JOHN E. HERBISON, being duly sworn according to law, makes oath as follows:

1) I am an attorney licensed to practice law by the State of Tennessee since 1987. I am a member in good standing of the bar of this Court, the Supreme Court of Tennessee, the United States Court of Appeals, Sixth Circuit, and the United States Supreme Court.

2) Along with H. Louis Sirkin of the Ohio bar, I represent the Plaintiffs before this Court in the *Pendergrass* matter, that is, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

3) Since approximately 1988 I have been continuously retained by Mr. Pendergrass individually in regard to representation of adult entertainment businesses with which Mr. Pendergrass is associated. I have been continuously retained by The 822 corporation since that business was incorporated in 1992. My participation in the instant lawsuit is pursuant to these retainer agreements.

4) My fee arrangements with Mr. Pendergrass and The 822 Corporation for professional services include the regular payment of a monthly, flat fee. I have accordingly not billed my clients by the hour for my time in the instant lawsuit, and, because I have not kept contemporaneous time records I have elected not to submit a request for an award of interim fees in this matter.

5) The substantive work which I have done on this lawsuit, *e.g.*, legal research, drafting pleadings and motions, appearing in court, participating in discovery, etc., has been performed pursuant to the above-described retainer. As the only Plaintiffs' attorney in this action based in Nashville, however, I have performed services benefitting all of the Plaintiffs in the consolidated cases, for example, filing certain documents, serving documents on opposing counsel, procuring and serving subpoenas,

coordinating scheduling of telephone conferences, etc. To the extent that these services have benefitted parties other than those by whom I am retained, I have not charged these parties for my time. It is my opinion and belief that my attending to these logistical matters has reduced the number of hours which would otherwise have been expended by co-counsel for the *Pendergrass* Plaintiffs and both counsel for the *Deja Vu* Plaintiffs, for which these counsel likely would have billed and sought a greater amount of fees under 42 U.S.C. § 1988 had I not performed such services.

FURTHER THE AFFIANT SAITH NOT.

/s/ John E. Herbison
JOHN E. HERBISON

Sworn to and subscribed before me this 21st day of January, 2000.

/s/ Lisa A. [Illegible] My Commission expires: 09/28/02
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1066 Judge Higgins Magistrate Judge Griffin
JERRY C. PENDERGRASS, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	Consolidated Cases No. 3-97-1176 Judge Higgins Magistrate Judge Griffin

PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S OCTOBER 1, 2002 REPORT AND RECOMMENDATION

(Filed Oct. 17, 2002)

Pursuant to Local Rule 302(e), Plaintiffs hereby give notice of their objections to the Report and Recommendation of the Magistrate Judge, which was filed in this matter on

October 1, 2002. The objections are based on the following grounds:

1. The Magistrate Judge used some incorrect figures initially supplied by the Plaintiffs, and not the later corrected version of those figures.

2. The Magistrate Judge did not grant the prevailing party Plaintiffs a total and complete recovery of their reasonable attorney fees and costs.

3. The Magistrate Judge incorrectly interpreted a recent Supreme Court decision to deny the Plaintiffs' request for attorney fees for all work done on ordinance provisions that were later amended by the Defendant.

4. The Magistrate Judge incorrectly denied, without prejudice, all of the claimed costs and expenses submitted by the Plaintiffs.

5. These objections are supported by the attached Memorandum of Law.

Dated: October 16, 2002. /s/ Andrew Wilkins

Bradley J. Shafer, MI P36604*
Andrew K. Wilkins, MI P-56559*
Shafer & Associates, P.C.
Counsel for "Deja Vu" Plaintiff
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone
*Admitted as counsel pro hac vice

Dated: October 16, 2002. /s/ Lou Sirkin by AKW

H. Louis Sirkin (w/permission)
Counsel for "Pendergrass"
Plaintiffs
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776

Michael F. Pleasants
Co-Counsel for "Deja Vu" and
"Pendergrass" Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	No. 3-97-1066 Judge Campbell Magistrate Judge Griffin
JERRY C. PENDERGRASS, *et al.*, Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	Consolidated Cases No. 3-97-1176 Judge Campbell Magistrate Judge Griffin

DEFENDANTS' OBJECTION TO THE REPORT AND RECOMMENDATION (DOCKET NO. 265)

(Filed Nov. 8, 2002)

Defendants respectfully object to the Report and Recommendation issued by U.S. Magistrate Judge Juliet Griffin regarding plaintiffs' request for attorney's fees.

1. As to the second injunction, plaintiffs are only nominally "prevailing parties," so an additional downward adjustment of attorneys fees is appropriate.

Defendants respectfully suggest that the key point in determining an appropriate amount of attorney's fees is the fact that this litigation is easily separable into two distinct parts: the grant of the first preliminary injunction, its dissolution and the appeal thereof; and the grant of the second preliminary injunction, which was made final, and its subsequent appeal. The issues raised in plaintiffs' two injunction motions are entirely distinct. The first injunction motion was based on the alleged lack of "prompt judicial review" procedures in the Metropolitan Government's sexually oriented business ordinance. However, the second injunction motion contained a panoply of arguments, all of which were ultimately found to have no merit on appeal, except for the Sixth Circuit's finding that the term "sexually-oriented" was unconstitutionally overbroad. Even though the Sixth Circuit found this term overbroad, the court also found that the term could be easily severed from the ordinance without affecting the licensing scheme. *Déjà Vu of Nashville. Inc. v. Metropolitan Government*, 274 F.3d 377, 389 (6th Cir. 2001)

As to the appeal of the dissolution of the first injunction – the "prompt judicial review" appeal – Judge Griffin found that defendants owe plaintiffs $72,105.23 in their first application for fees and an additional $19,152.50 in their third application for fees. (Report and Recommendation, Docket No. 265, at 15 & 24-25). Defendants do not contest these amounts.

However, the issue is less clear regarding the remainder of plaintiffs' attorneys' billings, since the ultimate resolution of the rest of the case was favorable to plaintiffs only in a nominal, or technical sense. The bottom line is after raising literally dozens of challenges to the ordinance, and litigating them all the way to the Sixth Circuit, plaintiffs emerged with a finding that the term "sexually-oriented" (which appears in the definitional section of the ordinance only, and not as a stand-alone term in the text of the ordinance itself), was unconstitutional. The crux of the problem regarding the bulk of plaintiffs' attorneys' fees is that plaintiffs are asking the Court to reward them handsomely for a tremendous quantity of work which resulted in virtually no success for them.

The U.S. Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) indicated there should be a "generous threshold" for prevailing party status, with prevailing parties defined as those who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Since that time, however, the Supreme Court has reexamined its definition of a "prevailing party" on several occasions. As a result, the "threshold" for prevailing party status is no longer quite so generous, and plaintiffs fail to qualify as "prevailing parties" under that less generous definition.

Five years after the *Hensley* decision, the Court reversed an award of attorney's fees that was premised solely on a declaratory judgment that prison officials had violated the plaintiff's First and Fourteenth Amendment rights. *Rhodes v. Stewart,* 488 U.S. 1 (1988) (per curiam). In so ruling, the Court held that "nothing in [its prior holdings] suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under § 1988." *Id.* at 3. The Court went on to hold that a judgment – declaratory or otherwise – "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.* at 4. Accordingly, even though the *Rhodes* plaintiffs had obtained a declaratory judgment against the defendant prison officials, they were not prevailing parties, because the Court's judgment did not affect how prison officials actually treated them.

In the years following the *Rhodes* decision, the Supreme Court continued to emphasize the need for a plaintiff asserting prevailing party status to "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist,* 489 U.S. 782, 792 (1989). In doing so, the Court clarified that the "touchstone of the prevailing party inquiry [was] the material alteration of the legal relationship between the parties." *Id.* Then, in 1992, the Court redefined the nature of the "success" necessary for a party to obtain prevailing party status, holding that to achieve such status, a plaintiff "must obtain an enforceable judgment against the defendant from whom fees are sought . . . that directly benefit[s] him at the time of the judgment or settlement." *Farrar v. Hobby,* 506 U.S. 103, 111 (1992). In *Farrar,* the

Court held that "[i]n short, a plaintiff 'prevails' 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Based upon this new, "synthesized" understanding of who qualifies as a "prevailing party," the Court in *Farrar* went on to find that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* However, the Court also observed that:

> [t]o be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

506 U.S. at 112-13.

Applying this language to the present case, as to the second injunction in its entirety plaintiffs do not meet the criteria of "prevailing parties." As to that entire motion, plaintiffs succeeded in obtaining a ruling that the term "sexually oriented" violated the Constitution, yet the Sixth Circuit found that it could be easily severed from the ordinance without having any impact on the licensing scheme. *Déjà vu* at 389.

Defendants respectfully submit that the rationale of *Farrar* applies to the present case. Plaintiffs' success in

having the Sixth Circuit find a single term in the ordinance unconstitutionally overbroad but then finding that it could be easily severed is, at most, a *de minimus* or technical victory. In the face of such limited success, the Court should "engage in a measured exercise of discretion" when deciding what amount of attorney's fees is appropriate. *Farrar* at 114. The Court should consider the net effect of plaintiffs' efforts in pursuing the second injunction and the subsequent appeal resulting therefrom, in determining a reasonable fee based thereon. In fact, considering plaintiffs' nominal success in the bulk of the litigation, the Court may award a low fee without performing the 12-factor reasonableness analysis set forth in *Hensley*. *Farrar*, at 115; *Id.* at 117-118 (O'Conner J. concurring).

Defendants respectfully submit that while Judge Griffin was on the right track, she simply did no go far enough. By defendants' count, Judge Griffin disallowed $133,376.59 of plaintiffs' total attorney's fees. Clearly, Judge Griffin was trying to award plaintiffs a fee based on the degree of success obtained while not awarding fees for work performed on easily severable matters upon which the plaintiffs did not prevail. Judge Griffin's recommended reduction in the fees sought is significant. However, it should go further.

Under *Farrar*, defendants ask the Court to make an additional reduction in the amount of fees to reflect the fact that plaintiffs' ultimate success on all the issues raised in their second injunction motion was minimal. When the $133,376.59 disallowed by Judge Griffin is subtracted from the $569,184.66 plaintiffs requested in their first three fee applications, the resulting award of fees is $435,808.07. Defendants respectfully suggest a more significant reduction is appropriate in light of plaintiffs'

negligible success in litigating the issues raised in the second injunction motion. One only has to consider the sheer volume of paper consumed by the second preliminary injunction filing itself to realize that the briefing of the issues raised therein constituted the lion's share of this litigation.

Defendants do not contest the $72,105.23 in the first fee application incurred in litigating the first injunction motion, nor the $19,152.50 in the third fee application incurred in the appeal of the dissolution of the first injunction. These amounts total $91,257.73. Defendants suggest that a figure closer to this one, and significantly less than the $435,808.07 awarded by Judge Griffin, would be appropriate.

Out of 43 issues plaintiffs raised in their second injunction motion, they prevailed at the trial court level on 4 of them. *See* defendants' response to plaintiffs' second fee request at 1-2, n. 2, Docket no. 215. Of the 17 issues raised by all plaintiffs combined in their briefs on the appeal of the second injunction, the only issue on which they succeeded at the Sixth Circuit was on the overbreadth of the term "sexually oriented."

Thus, when the $91,257.73 relating to the first injunction and the appeal thereof (which defendants concede is owed) is subtracted from the $435,808.07 awarded by Judge Griffin, the balance is $344,550.34. As to these fees, the bulk of which were incurred in litigating the second injunction at the trial and appellate levels, the Court should engage in a "measured exercise of discretion" to reflect plaintiffs' limited degree of success. Defendants submit it is reasonable to reduce this figure by two-thirds, like Judge Griffin did for all work performed after April 3,

2000. The resulting amount of $114,850.11, although generous to plaintiffs, should then be added to the $91,257.73 which defendants concede is owed, for a total fee award of $206,107.84.

2. The demise of the "catalyst rule."

In their objections to Judge Griffin's Report and Recommendation, plaintiffs expend considerable effort in an attempt to convince the Court that the "catalyst rule" is still a valid theory under which to award attorneys fees. However, such is not the case. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services,* 532 U.S. 598 (2001), the United States Supreme Court determined that the fee-shifting provisions of 42 U.S.C. § 1988 should not be used to award attorney fees based on the catalyst theory. In *Buckhannon,* writing for the majority, Justice Rehnquist defines a prevailing party as, "one who has been awarded some relief by the court." *Id.* at 602. Furthermore, the Court clearly states that a judgment by the court must be awarded, changing the legal relationship of the parties, for a party to be considered a "prevailing party" with regards to the fee-shifting provisions of § 1988. *Id.*

In *Chambers v. Ohio Dept. of Human Services,* 273 F.3d 690 (6th Cir. 2001), the Sixth Circuit reviews the history of the "catalyst theory" and the impact of the *Buckhannon* decision, ultimately concluding that "The Supreme Court's recent opinion in *Buckhannon* . . . has made clear that to 'prevail' the party must have obtained a change in the legal relationship of the parties that originated in a court order or that had at least received judicial sanction. The catalyst theory of success thus is no longer a

permissible basis for awarding attorneys fees." *Chambers*, at 691.

The "catalyst rule" is no longer available to the plaintiffs.

In the Report and Recommendation, Judge Griffin cites to *Buckhannon*, and she correctly holds that plaintiffs may not recover fees for work which plaintiffs contend was merely the "catalyst" for amendments to the ordinance. Report, at 13-14. Despite plaintiffs' protestations to the contrary, Judge Griffin followed *Buckhannon* and she properly attempted to exclude work which did not lead to court-ordered relief. The fact that the catalyst rule may have been a viable theory when plaintiffs made their initial application for fees is beside the point. It is no longer the law in Section 1983 cases, and Judge Griffin properly attempted to exclude fees for work which plaintiffs merely allege was the "catalyst" for amendments to the ordinance. Defendants respectfully submit that Judge Griffin simply did not go far enough in disallowing fees which are no longer recoverable under the catalyst rule.

3. Plaintiffs' first and second requests for fees.

In their objections, plaintiffs take issue with Judge Griffin' methodology through which she separated out billings for work performed on aspects of the case in which plaintiffs clearly did not prevail. Plaintiffs reiterate their contention that all the work in the case was so intertwined that it is impossible to separate it into allowable and disallowable components. Plaintiffs seem to complain that they are being penalized for providing some billing records which identify with some specificity the actual work performed. Plaintiffs appear to argue that if they had

submitted more vague and indescriptive billing records, then Judge Griffin would not have been able to weed out the work which did not result in any court-ordered relief. As a result, plaintiffs seem to contend that Judge Griffin would have recommended awarding a higher fee.

This argument overlook the basic function of submitting billing records. The records have to be sufficiently detailed to allow the Court to ascertain the nature of the work, in order to determine if the particular work led to a successful result. Hypothetically speaking, if billing records are intentionally vague, in an effort to stymie the Court in its attempt to fairly award fees, plaintiffs should be penalized, not rewarded. If the Court can't tell the issues upon which work was done in a given time entry, the Court should disallow the entry, not give plaintiff the benefit of the doubt.

Judge Griffin obviously spent a great deal of time and effort in reviewing all plaintiffs' counsels' time entries, and she weeded out the ones which were obviously not related to claims upon which plaintiffs succeeded. However, as set forth above, an additional reduction is appropriate, since Judge Griffin obviously resolved many questionable entries in plaintiffs' favor.

4. Plaintiffs' third request for fees.

In their objections, plaintiffs complain that Judge Griffin disallowed two-thirds of their requested fees in their third request for fees. However, defendants submit that Judge Griffin performed exactly the type of analysis contemplated in *Hensley, supra*.

The initial oral argument before the Sixth Circuit on the "prompt judicial review" appeal was held on March 6, 2000.[1] After allowing fees for some follow-up work apparently related to the first appeal, Judge Griffin then disallowed two-thirds of the fees generated after April 3, 2000, the vast majority of which related to the appeal of the second injunction, which is the injunction that plaintiffs had so little success defending in the Sixth Circuit.

Judge Griffin's disallowance of two-thirds of the fees generated after the first appeal was a common-sense attempt to award a reasonable fee relative to the degree of success plaintiffs obtained in their appeal of the second injunction. Defendants invite the Court to consider that plaintiffs actually appealed the grant of the second injunction – which they sought in the first place – presumably because they were not happy with Judge Higgins' stated reasons in entering that injunction. A significant (yet unquantifiable) amount of attorneys' fees related to the appeal of the second injunction were incurred as a result of plaintiffs' appealing an injunction **entered in their favor!** Surely the Court may take cognizance of that fact in making a significant percentage reduction of the amount of fees generated by plaintiffs' in that appeal.

Discounting two-thirds of the fees related to the appeal of the second injunction is actually a generous apportionment in plaintiff's favor. Despite raising dozens of claims of alleged constitutional infirmity they only

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[1] However, at oral argument the Court indicated it was going to consolidate that appeal with the recently filed appeals concerning the second injunction. Thus, substantive argument on the first appeal was reserved until all the appeals were argued together on January 24, 2001.

succeeded at the Sixth Circuit in obtaining a ruling that "sexually oriented" is unconstitutionally overbroad, but that the term could easily be severed without affecting the licensing scheme. When compared to the total amount of time, expense and paper consumed in litigating the second injunction, this "success" is *de minimus,* at best.

5. Plaintiffs' requests for costs and expenses.

Defendants object to plaintiffs' charges for UPS next day air, or Federal Express shipping. As to the bulk of plaintiffs' charges for costs, it is impossible to identify what claims were supported by each individual cost, so that the Court can make a fair assessment of costs in the same manner as making an assessment regarding attorney fees. As such, plaintiffs' request for an award of costs should be discounted in the same percentage as the ultimate fee determination.

Adding the total costs for the first three fee requests from the summary pages of plaintiffs' brief in support of their refiled motion for costs results in a figure of $56,456.63. Discounting this figure by two-thirds results in a total costs award of $18,818.87.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY
KARL DEAN, #10419,
DIRECTOR OF LAW

/s/ James L. Charles FHY
James L. Charles, #9007
Associate Director of Law

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 8 of November, 2002.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)
Plaintiffs,	)
v.	) No. 3-97-1066
	) Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	) Magistrate Judge Griffin
Defendants.	)
	) Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)
Plaintiffs,	)
v.	) No. 3-97-1176
	) Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	) Magistrate Judge Griffin
Defendants.	)

STIPULATED NOTICE OF THE TOTAL ATTORNEY FEES "AWARDED" BY THE MAGISTRATE'S REPORT AND RECOMMENDATION (DOCKET NO. 265)

(Filed Feb. 7, 2003)

Pursuant to this Court's Order of December 6, 2002 (Docket No. 276), the parties to this action hereby provide notice to this Honorable Court that they stipulate that the

amount of attorney fees "awarded" by the Magistrate Judge in her Report and Recommendation of October 1, 2002 (Docket No. 265), as it relates to the Plaintiffs' first three motions for attorney fees and costs) is $431,099.56. This amount is to be allocated as follows: $367,080.37 to the law firm of Shafer & Associates, P.C., on behalf of the "Deja Vu" Plaintiffs; $10,928.36 to the law firm of Michael Pleasants, Esq., on behalf of the "Deja Vu" Plaintiffs; and $53,090.83 to the law firm of Sirkin, Pinales, Mezibov & Schwartz on behalf of the "Pendergrass" Plaintiffs.

This stipulation as to the amount of attorney fees awarded in the Report and Recommendation shall in no way be construed as a concession by any party to the correctness of either the Report and Recommendation (Docket No. 265) or the District Court's Order of December 6, 2002 (Docket No. 276).

/s/ Andrew Wilkins
ANDREW K. WILKINS
(P56559)*
Co-Counsel for
"Deja Vu" Plaintiffs
Dated: 2/6/03

/s/ Francis Young
FRANCIS H. YOUNG,
16554
Co-Counsel for Defendants
Dated: 2/6/03

/s/ Michael Pleasants
MICHAEL PLEASANTS
Co-Counsel for both the
"Deja Vu" and
"Pendergrass" Plaintiffs
Dated: 2/6/03

/s/ H. Louis Sirkin
H. LOUIS SIRKIN*
Co-Counsel for
"Pendergrass" Plaintiffs
Dated: 2/6/03

*Admitted Pro Hac Vice

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE INC., a Tennessee Corporation, *et al.*,	
Plaintiffs,	No. 3-97-1066
v.	Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,	Magistrate Judge Griffin
Defendants.	
JERRY C. PENDERGRASS, *et al.*,	Consolidated Cases
Plaintiff,	
v.	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	Judge Campbell Magistrate Judge Griffin
Defendant.	

DEFENDANTS' OBJECTION TO THE REPORT AND RECOMMENDATION (DOCKET NO. 283)

Defendants respectfully object to the Report and Recommendation issued by U.S. Magistrate Judge Juliet Griffin regarding plaintiffs' fourth request for attorney's fees.

Defendants incorporate by reference the arguments made and authorities relied upon in their response to plaintiffs' fourth request for attorney's fees (Docket no. 263). In particular, defendants object to plaintiffs' being allowed to claim fees for their work on their second and third fee petitions, since the bulk of those fees were for work related to the second preliminary injunction, as to which plaintiffs were completely unsuccessful before the Sixth Circuit on all but one issue. These fees should be reduced by at least two-thirds.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
KARL DEAN, #10419,
DIRECTOR OF LAW

/s/ James L. Charles
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Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 30 of September, 2003.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police in his official capacity, Defendants.	No. 3-97-1066 Judge Campbell Magistrate Judge Griffin
JERRY C. PENDERGRASS, *et al.*, Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant	Consolidated Cases No. 3-97-1176 Judge Campbell Magistrate Judge Griffin

MOTION TO DISSOLVE THE INJUNCTION

The Metropolitan Government respectfully moves this Honorable Court to dissolve the permanent injunction entered in this case on December 23, 1999, enjoining it from enforcing Chapter 6.54 of the Metropolitan Code of Laws. Chapter 6.54 of the Metropolitan Code of Laws

(hereinafter, M.C.L.) regulated sexually oriented businesses through its licensing and permitting procedures. For grounds, the Metropolitan Government states:

1. The United States Court of Appeals held in this case that:

> Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected.

Déjà vu, Inc. v. The Metropolitan Government of Nashville and Davidson County, 274 F.3d 377, 403 (6th Cir. 2002).

2. Although the United States Supreme Court denied the Metropolitan Government's petition for certiorari, *The Metropolitan Government of Nashville and Davidson County v. Déjà vu of Nashville, Inc.*, 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed. 2d 855 (May 13, 2002), in the later case *City of Littleton v. Z.J. Gifts*, 541 U.S. 774 (2004), the United States Supreme Court addressed the adequacy of judicial review procedures and specifically rejected the legal premises upon which the Sixth Circuit had concluded that Chapter 6.54 M.C.L. did not provide for prompt judicial review of the Metropolitan Government's Sexually Oriented Business Licensing Board's decisions.

3. T.C.A. Section 27-9-111(e) was amended to comply with the Sixth Circuit's requirements for guaranteeing prompt judicial review, even though it is now unnecessary.

4. The definition of the term "sexually oriented" has been amended to cure its overbreath.

5. Even if the definition of "sexually oriented" were still overly broad, the Court must then sever the offending term and dissolve the injunction, since the judicial review procedures are adequate.

While the Metro Nashville Government asks that this Court grant its motion to dissolve the injunction, it further request the Court to stay the effective date of its order for a period of ninety (90) days from the date of entry of its order. The stay would allow sexually oriented businesses and entertainers sufficient time to come back into compliance with the requirements of Chapter 6.54 M.C.L. Any sexually oriented business operating within the Metropolitan Government on the effective date of the Court's order will be an "existing sexually oriented business" for purposes of compliance with Chapter 6.54 M.C.L. Any entertainer performing sexually oriented entertainment in a sexually oriented business within the Metropolitan Government on the effective date of the Court's order will be a "current entertainer" for purposes of compliance with Chapter 6.54 M.C.L.

The following exhibit is submitted in support of the motion:

A. Chapter 6.54, Metropolitan Code of Laws (as currently amended).

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
KARL DEAN, # 10419
DIRECTOR OF LAW

/s/ James L. Charles
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 25th of February, 2005.

/s/ James L. Charles
James L. Charles